90-1559

NO.

Supreme Court, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PAUL J. ERLANDSON, INDIVIDUALLY
AND AS INDEPENDENT EXECUTOR OF THE
ESTATE OF LORENE E. NEE
AND SANDRA VAN DER ES-ERLANDSON

Petitioners

versus

INTERNATIONAL BANK OF
CORPUS CHRISTI, N.A.
INDEPENDENT ADMINISTRATOR OF THE ESTATE
OF JOHN W. NEE AND JOHN R. NEE, DAVID NEE
MICHAEL G. NEE AND LINDA NEE BECK

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

PETITIONERS REQUEST ORAL ARGUMENT

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I. QUESTIONS PRESENTED FOR REVIEW

1. Texas denied Petitioners equal protection by denying Petitioners their right to have their case heard before a fully, legally constituted Texas Court of Appeals as required by the Texas Constitution and granted to other Texas citizens, in violation of the Fourteenth Amendment of the U.S. Constitution.

2. Texas denied Petitioners their community property rights by re-examining and disregarding favorable jury findings that required property to be distributed to Petitioners as their mother's community property under Texas law in conformity with the Texas Constitution and the Seventh Amendment of the U.S. Constitution.

3. Texas denied Petitioners their separate property rights by re-examining and disregarding favorable jury findings that required property to be distributed to Petitioners as their mother's separate

property under Texas law
in conformity with the Texas Constitution and the Seventh Amendment of the U.S. Constitution.

4. Texas denied Petitioners equal protection with other Texas citizens under the 14th Amendment of the U. S. Constitution, by depriving Petitioners of community property rights and holding as a matter of law, monies paid under a stock repurchase buy-sell agreement was the separate property of the deceased husband, where the jury found and the evidence supported the monies were community property as deferred compensation.

5. Texas denied Petitioners equal protection with other Texas citizens under the 14th Amendment of the U.S. Constitution by depriving petitioners of their mother's separate property rights in monies found by the jury to be separate property of Petitioners estate.

II. LIST OF ALL PARTIES

Petitioners:

1. Paul J. Erlandson beneficiary of Lorene E. Nee and Executor of the Estate of Lorene E. Nee
2. Sandra Van der Es-Erlandson beneficiary of Lorene E. Nee Estate

Respondents:

3. International Bank of Corpus Christi, N.A. Independent Administrator of the Estate of John W. Nee
4. John R. Nee, beneficiary of Estate of John W. Nee
5. David Nee, beneficiary of Estate of John W. Nee
6. Michael G. Nee, beneficiary of Estate of John W. Nee
7. Linda Nee Beck, beneficiary of Estate of John W. Nee

Other Interested Parties:

8. Briner Paint Manufacturing Company, a closely held corporation located in Corpus Christi, Texas

CERTIFICATE OF SERVICE: A true and correct copy of the foregoing pleading was mailed this date to attorney for Respondents Charles R. Cunningham at 503 Wilson Tower, Corpus Christi, Texas and Andrew Lehrman and Robert Anderson at 1100 Bayview Federal Building, Corpus Christi, Texas, on this the 8th day of April, 1991.

Respectfully submitted,
Attorneys for Petitioners

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VI. OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

See opinion of the Thirteenth Court of Appeals contained in the Appendix as Exhibit "1".

VII. CONCISE STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF U.S. SUPREME COURT IS INVOKED

i) **ENTRY OF JUDGMENT OR DECREE SOUGHT TO BE REVIEWED** February 1, 1990

ii) **DATE OF ANY ORDER RESPECTING A REHEARING**

February 27, 1990:	Rehearing Denied by 13th Court of Appeals
November 14, 1990:	Application for Writ of Error to Texas Supreme Court Denied
January 9, 1991:	Rehearing Denied in Texas Supreme Court

iii) **STATUTORY PROVISION BELIEVED TO CONFER ON U.S. SUPREME COURT JURISDICTION TO REVIEW JUDGMENT OF THIRTEENTH COURT OF APPEALS OF THE STATE OF TEXAS**

28 U.S.C. § 1257

14th Amendment of the U.S. Constitution

7th Amendment of the U.S. Constitution

The Thirteenth Court of Appeals "remanded" the case to the Trial Court for the purpose of having the Trial Court ministerially vacate its judgment and render that the Plaintiff take nothing as to the claim for a community interest in the monies found by the jury to be deferred compensation and presumed to be community property.

VIII. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

1. U. S. Constitution on Right to Jury Seventh Amendment

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

2. U. S. Constitution on Equal Protection Fourteenth Amendment

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws."

3. Texas Constitution on Right to three (3) appellate judges

"Sec. 6. The state shall be divided into courts of appeals districts, with each district having a Chief Justice, two or more other Justices, and other officials as may be provided by law. The Justices shall have the qualifications prescribed for Justices of the Supreme Court. The Court of Appeals may sit in sections as authorized by law. The concurrence of a majority of the judges sitting in a section is necessary to decide a case. Said Court of Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be

prescribed by law. Provided that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error. Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law. * * *." (Vernon's Ann.Tex.Const. art. 5, sec. 6). Donald v. Carr, 407 S.W.2d 288 (Tex.Civ.App.--Dallas, 1965)(no power to render declaratory judgment).

4. Texas Government Code on right to three (3) appellate judges

Sec. 22.222. Court Sitting in Panels:

"(a) Each court of appeals may sit in panels of not fewer than three justices for the purpose of hearing cases.

"(b) If more than one panel is used, the court of appeals shall establish rules to periodically rotate the justices among the panels. Permanent civil panels and criminal panels without rotation may not be

established."

"(c) A majority of a panel constitutes a quorum for the transaction of business, and the concurrence of a majority of a panel is necessary for a decision." (V.T.C.A., Government Code § 22.222).

5. Texas Rules of Appellate Procedure promulgated by the Texas Supreme Court:

a. Vernon's Ann.Rules App.Proc., rule 79:

(a) "Except as provided in section 22.223 of the Government Code and these rules, original submissions of civil and criminal cases in a court of appeals shall be to a panel of the court consisting of three justices. A majority of the panel shall constitute a quorum and the concurrence of a majority of the panel shall be necessary for a decision. Except as otherwise provided in these rules, the decision of a panel of a court of appeals shall constitute the final decision of the

court."

"(b) If for any reason only two justices participate in the decision of a panel of a court of appeals consisting of more than three justices and they cannot concur in a decision because they are equally divided, the Chief Justice of the Court of Appeals shall designate another justice of the court to participate in the decision of the case. After such justice is designated, the panel may order the case reargued, at its discretion. In the alternative, the Chief Justice of the Court of Appeals may convene the court en banc for the purpose of deciding the case. The en banc may order the case reargued at its discretion. * * *" (Vernon's Tex.Rules App.Proc., rule 79).

b. Vernon's Ann.Rules App.Proc., rule 100:

"(a) Motion for Rehearing. Any party desiring a rehearing of any matter

determined by a court of appeals or any panel thereof must, within fifteen (15) days after the date of rendition of the judgment or decision of the court, file with the clerk of the court a motion in writing for a rehearing, in which the points relied upon for the rehearing shall be distinctly specified. * * *

"(c) Decision on Motion. If a majority of the justices of the court of appeals or of the panel that was assigned the case are of the opinion that the case should be reheard, the motion shall be granted and the case shall be resubmitted. If a majority of the court of appeals or of the panel that was assigned for the case are of the opinion that the case should not be reheard, the motion for rehearing shall be overruled. If a motion for rehearing is granted, the court of panel may make final disposition of the cause with or without re-briefing and oral

argument, and may make such orders as are deemed appropriate under the circumstances of the particular case. * * *" (Vernon's Ann.Rules App.Proc., rule 100).

6. Texas Supreme Court Opinions on three (3) appellate judges

Hayden v. Liberty Mutual Fire Insurance Company, 786 S.W.2d 260 (Tex. 1990):

A Texas Court of Appeals rendered a decision after one of the appellate justices retired and the decision was rendered on the submission to two justices, wherein one justice dissented. The Texas Supreme Court reversed the judgment of the Court of Appeals and remanded the case back to the Court of Appeals to have the matter heard before a full panel consisting of three (3) justices as required by the Texas Constitution. This case was delivered on February 28, 1990.

7. Texas Constitution on Community Property

"All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise, or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to the separate and community property; provided that persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or party of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse in any property for the community interest of the other spouse or future spouse in other community property than existing or to be acquired, whereupon

the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; * * *" [Vernon's Ann.Tex.Const. art. 16, § 15, (Supplement 1991)]

8. Texas Family Law Code on Community Property

Sec. 5.02. Presumption.

"Property possessed by either spouse during or on dissolution of marriage is presumed to be community property. The degree of proof necessary to establish that property is separate property is clear and convincing evidence. (Texas Family Code § 5.02).

9. Texas Constitution on Right to a Jury

Art. 1, § 15. Right of Trial by jury

"The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same and to maintain its purity and

efficiency. Provided, that the Legislature may provide for the temporary commitment, for observation and/or treatment, of mentally ill persons not charged with a criminal offense, for a period of time not to exceed ninety (90) days, by order of the County Court without the necessity of a trial by jury." (Vernon's Ann.Tex.Const. Art. 1, § 15).

10. **Texas Right to Declaratory Judgment and right to a jury trial**

"Sec. 37.005. Declarations Relating to Trust or Estate:

"A person interested as or through an executor, administrator, trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust or of the estate of a decedent, an infant, lunatic, or insolvent may have a declaration of rights or legal relations in respect to the trust

or estate:

"(1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;

(2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings." (Texas Civ. Prac. & Rem. Code § 37.005)

Sec. 37.007. Jury Trial

"If a proceeding under this chapter involves the determination of an issue of fact, the issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in

the court in which the proceeding is pending." (Texas Civ. Prac. & Rem. Code § 37.007).

IX. CONCISE STATEMENT OF THE CASE

1. THE FACTS MATERIAL TO CONSIDERATION OF QUESTIONS PRESENTED

John Nee had three (3) wives and four (4) children by his first two marriages. Lorene, his third wife, had two children by her first marriage, was widowed in Georgia, and moved to Texas to marry John Nee. Lorene had substantial separate property which she brought from Georgia to Texas.

Lorene E. Nee and John W. Nee were married for seventeen (17) years. Three (3) years prior to their marriage, John W. Nee held 2,000 shares of stock in a closely held corporation called Briner Paint Mfg. Co., Inc. ("Briner Paint"). John W. Nee was the chemist who formulated the paint which Briner Paint manufactured and sold, and was the key person to the success of Briner Paint. During the seventeen year marriage, the stock increased in value from $25.00 per share to $467.51 per

share. Upon John Nee's retirement from Briner Paint on February 1, 1984, the stock was valued at $1,028,522.00.

Briner Paint required the shareholders and their spouses to enter into a buy-sell agreement which required them to resell their stock upon retirement or death of the employed spouse. Uncontroverted testimony was presented at the time of trial that the $1,028,522.00 value of the stock, was in fact "deferred compensation." The increase in the value of the stock was attributed to John Nee retaining community earnings in Briner Paint and occurred wholly during the marriage of John and Lorene Nee.

Lorene Nee died on May 31, 1984. John W. Nee died on October 20, 1986. Petitioners brought suit under the Texas Declaratory Judgment Act against John's estate and the children of his first two marriages, to have a jury determine the community or separate character of the

$1,028,522.00 paid under the stock repurchase buy-sell agreement.

The jury found the $1,028,522.00 monies paid pursuant to the buy sell agreement was deferred compensation which made the monies community property. [Appendix Exhibit 9 (jury verdict)].

The Estate of John W. Nee submitted findings to the jury as to the separate character of the monies paid under the buy-sell agreement, and the jury found that John W. Nee had no separate interest in the monies, thereby making the monies the community property of John and Lorene E. Nee, entitling Petitioners to one-half the proceeds under Texas law and the Texas Constitution.

The trial court properly upheld the jury's findings and entered judgment that the monies paid were community property entitling the Lorene E. Nee estate to one-half the proceeds. [Appendix Exhibit 10 (Trial Court Judgment)].

Lorene E. Nee was a widow at the time she married John W. Nee. She brought with her to the marriage substantial separate property. The jury, by clear and convincing evidence, found that $71,977.00 was Lorene E. Nee's separate property entitling Petitioners to the entire $71,977.00. Judgment was entered on the jury verdict on June 30, 1988 in favor of Petitioners.

The Court of Appeals, re-examined the factual findings of the jury, disregarded all findings and denied the Lorene E. Nee Estate her community property interests in the $1,028,522.00 proceeds from Briner monies and denied the Lorene Nee Estate its separate property rights of $71,977.00.

The case was argued and submitted to a Court of Appeals panel consisting of three (3) justices, Utter, Kennedy, and Dorsey. After submission, Justice Dorsey recused himself. The case was reversed on February 1, 1990.

Justice Utter died on February 6, 1990. On February 28, 1990, the Texas Supreme Court held that a court of appeals panel of not less than three (3) justices was required for cases in the courts of appeals. Texas appellate rules require the Motion for Rehearing to be filed "before the same panel." Petitioners moved for rehearing en banc, and actually requested two additional justices be assigned to the panel hearing the case for reconsideration on rehearing. The En Bank request and rehearing was denied on February 27, 1990 by one remaining justice, Kennedy. Petitioners timely filed an application for writ of error to the Texas Supreme Court, which was denied on November 14, 1990. Rehearing was denied in the Texas Supreme Court on January 9, 1991.

X. FEDERAL QUESTIONS RAISED

1. STAGE IN PROCEEDINGS AT WHICH FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

a. Motion for Rehearing to the 13th Court of Appeals after the 13th Court of Appeals rendered judgment against the Plaintiff. See Appendix Exhibit "2".

b. Petitioner's Application for Writ of Error to the Texas Supreme Court. See Appendix Exhibit "4".

c. Petitioner's Motion for Rehearing in the Texas Supreme Court. See Appendix Exhibit "5".

2. METHOD AND MANNER OF RAISING THE FEDERAL QUESTIONS

Petitioners assigned points of error and argued in their briefs that Petitioners were being denied their constitutional rights because of the 13th Court of Appeals and the Texas Supreme Court failure to uphold the jury verdict and deny Petitioners equal protection of the laws with other Texas citizens.

3. **WAY IN WHICH THE FEDERAL QUESTIONS WERE PASSED UPON BY THOSE COURTS**

a. The 13th Court of Appeals overruled the Motion for Rehearing and did not pass on the federal questions.

b. The Texas Supreme Court denied considering the Application for Writ of Error and denied considering the Motion for Rehearing and did not pass on the federal questions.

4. **PERTINENT QUOTATION OF SPECIFIC PORTIONS OF THE RECORD OR SUMMARY THEREOF WITH SPECIFIC REFERENCES TO THE RECORD WHERE THEY APPEAR**

a. See Appendix "2": "Appellees' Motion for Reconsideration en banc; Appellees' Motion for Resubmission and Reargument; and Appellees' Motion for Rehearing" to the 13th Court of Appeals (page ii)

b. See Appendix "3": "Appellees' Motion for Reconsideration en banc; Appellees' Motion for Resubmission and Reargument; and Appellees' Motion for Rehearing" to the 13th

Court of Appeals (pages vii-viii, 2-7).

c. See Appendix "4": "Petitioner's Application for Writ of Error filed in the Texas Supreme Court" (pages ii, xi-xiv, xv)

XI. ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT

A. PETITIONERS DENIED PROPERTY RIGHTS

Texas courts have denied Petitioners their fundamental property rights:[1]

(1) to share equally in property found by the jury to be community and

(2) to retain property found by the jury to be Lorene Nee's separate property, and their birthright.

(1) COMMUNITY PROPERTY:

The jury found that a the buy-sell agreement plan utilized by Briner Paint in repurchasing shares of stock from John and Lorene Nee was a deferred compensation plan. The Briner plan provided for disability and retirement benefits with a buy-sell agreement which has long been recognized in tax and disability

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[1]See Lynch v. Household Finance Corporation, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (Conn. 1972); Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917)

planning for executives of small corporations.[2] Both funded and unfunded buy-sell agreements are methods utilized by closely held corporations, such as Briner Paint, to fund disability income insurance programs and allow for key owners to provide themselves retirement or disability payments in the form of benefit plans.[3] The fund utilized by Briner Paint which is the subject of this writ allowed John and Lorene Nee to defer their community earnings in a retirement type plan in exchange for compensation. "The owner [is] more interested in a return on capital than prior labor investment even though he is perfectly satisfied to reinvest firm monies while he was actively involved in his affairs

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[2] See McMahan, Disability Planning for Executives and Professionals, 23 Real Property, Probate and Trust J., 73 (Spring 1988)

[3] See McMahan at 111-23

and receiving current compensation."[4] Briner Paint retained John Nee's compensation for use and reinvestment of John Nee's deferred earnings, thus allowing Briner to grow, the stock increasing in value, and building adequate capital to fund the buy-sell agreement upon his retirement at a greater value for the capital investment John Nee was making at Briner because of Briner's increased net worth. The more common forms of deferred compensation plans are retirement pay, pension and profit-sharing plans, KEOGH plans, military pension plans, special payment plans, deferred commissions all of which are community property whose purpose is to defer taxes. These type of employee stock purchase plans are qualified plans under § 423 of the Internal Revenue Code, which defers tax consequences until a participant sells shares,

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[4] See McMahan at 112

similar to the benefits of John and Lorene E. Nee.

Under Texas Community law, deferred compensation is community property because it represents either a form of a retirement plan or earnings of the spouse made during coverture.[5]

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[5] See Vernon's Ann.Tex.Const. art. 16, Sec. 15, (Supplement 1991). Herring v. Blakely, 385 S.W.2d 843 (Tex. 1965); Davis v. Davis, 495 S.W.2d 607 (Tex.Civ.App.--Dallas, 1973, error dismissed);

The more common forms of deferred compensation plans analogous to the one utilized by Briner include retirement pay, pension and profit sharing plans, military pension plans, special payment plans, deferred commissions from real estate sales, group policy proceeds, all of which are community property and whose purpose is to defer taxes. See Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976); Neese v. Neese, 669 S.W.2d 388 (Tex.Ct.App.--Eastland, writ ref'd, no rev. error)(citing Cearley; Whorrall v. Whorrall, 691 S.W.2d 32 (Tex.Ct.App.--Austin, 1985, writ dismissed); Sprott v. Sprott, 576 S.W.2d 653, 655 (Tex.Civ.App.--Beaumont, writ dismissed); Simpson v. Simpson, 679 S.W.2d 39, 41 (Tex.Ct.App.--Dallas, 1984, no writ); Dessommes v. Dessommes, 505 S.W.2d 673,

Texas has denied Petitioners their share of community property by ignoring the jury's findings that the $1,028,522.00 paid under the Briner buy-sell agreement was deferred compensation and thus community property.

(2) SEPARATE PROPERTY:

Texas has denied Petitioners their mothers' separate property and Petitioners birth right

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681 (Tex.Civ.App.--Dallas, 1973, writ ref'd, no rev. error); Flagg Realtors, Inc. v. Harvel, 509 S.W.2d 885 (Tex.Civ.App.--Amarillo, 1974, writ ref'd, no rev. error); Sloan v. Douglass, 713 S.W.2d 436 (Tex.Ct.App.--Ft. Worth, 1986, writ ref'd, no rev. error); Nixon v. First State Bank of Corpus Christi, 540 S.W.2d 817 (Tex.Civ.App.--Corpus Christi, 1976, writ ref'd, no rev. error 544 S.W.2d 378 (Tex. 1976); Southern Pacific Transportation Co. v. Allen, 525 S.W.2d 300 (Tex.Civ.App.--Houston, 1975, no writ history citing Haughton v. Blackships, 462 F.2d 788 (5th Cir., 1972).

Deferred compensation established by statute for Texas state employees, places deferral of income and deferred compensation programs in the same category as retirement, pension, or other benefits provided by law. See Vernon's Ann.Civ.St. Art. 6252-3b.

by substituting the opinion of the two justices then one justice, on the Court of Appeals for that of the jury. Two justices, then one justice, when three were required, found there was no separate interest as a matter of law when the jury found, by clear and convincing evidence, that $71,977.00 was the separate property of Lorene Nee. Texas has failed to treat its citizens equally by denying Petitioners their fundamental property rights they are entitled to receive under the Texas Constitution as found by the jury.

B. JURY TRIAL

Petitioners were denied equal protection of the laws of the State of Texas because they have been effectively denied a jury trial in a cause of action which Texas law gives its citizens a right to a jury trial. In Texas, an executor of an estate may bring a suit for declaratory judgment to determine the

community and separate character of property.[6] The estate is entitled to a jury trial on the factual issues presented.[7] The jury's verdict shall remain inviolate.[8] No court shall re-examine the jury findings. U.S. Constitution VII Amendment. The Court of Appeals arbitrarily "unfound" the jury findings and held that Petitioners were not entitled to a jury, in direct contravention to the Texas constitution and statutes which allow litigants similarly situated to Petitioners herein to a jury trial to have property rights declared by a jury.[9]

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[6] See Texas Civ. Prac. & Rem. Code, Sec. 37.005

[7] Texas Civ. Prac. & Rem. Code Sec. 37.007

[8] Vernon's Ann.Tex.Const., art. 16, sec. 15

[9] See Texas Civ. Prac. & Rem. Code Sec. 37.005 and 37.007, and Vernon's Ann.Tex.Const., art 16, sec. 15. See Sawyer v. Sigler, 320 F.Supp. 690 (D.C. Neb, 1970 aff'd, 445 F.2d 818)

By holding that all factual issues could be resolved as a matter of law and no jury issue was presented, deprives Petitioners of the basic freedom allowed all United States citizens, and has allowed the "star chamber", and improperly constituted Court of Appeals, to rule and manipulate the constitutional conferring of property rights. Such privately funded retirement plans and become a tool for an unscrupulous spouse contemplating dissolution to deprive the helpmate of his or her constitutional property rights.

C. DENIED APPEAL

The Texas Courts have denied Petitioners their property rights by allowing to stand a holding by an improperly constituted court of appeals' of two then one justice's re-examination of the facts found by a jury, and "unfind" the factual matters, to take away property rights the Texas Constitution and U.S. Constitution allows Petitioners to

recover. The U. S. Constitution provides in the Seventh Amendment that no court shall re-examine the facts found by a jury in a civil matter.[10]

Other litigants are given a right to have three (3) justices sit on a Court of Appeals panel as required by the Texas Constitution and the Texas Government Code but at the very time the Texas Supreme Court is remanding a case to the Court of Appeals to be heard before three (3) justices, it denies Petitioners a remand when only one (1) justice sat for the rehearing. Texas promulgates rules that the Motion for Rehearing shall be presented to the same panel, but at the time of rehearing, there was only one justice remaining on the panel, a direct contravention to the Texas Constitution, and a denial of Petitioners due process and equal protection

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[10] Seventh Amendment, U.S. Constitution

rights under the Fourteenth Amendment of the U. S. Constitution.[11]

Texas has given access to a jury trial and three justices on a court of appeals, and now attempts to deprive one of its citizens of equal access to the courts and Petitioners full entitlement under the law.[12] The court's doors slammed shut to Petitioners when Justice Dorsey recused himself and Justice Utter died. Consequently Petitioners were denied due process by Texas, not only in stripping away their jury findings to leave them devoid of any rights to claim property the Texas constitution holds is their entitlement, but denied them a jury to determine the disputed

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[11] Vernon's Tex.Ann.Const., art. 5, sec. 6, and The Government Code Sec. 22.222. See Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (Fla. 1984) reh'g denied, 468 U.S. 1226, 105 S.Ct. 26, 82 L.Ed.2d 919.

[12] See Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (Ill. 1982).

factual issues.[13]

The egregious and arbitrary conduct of the Texas appellate courts has resulted in a gross miscarriage of justice. The Texas court's result denies Lorene Nee's children their birth right from their father and mother's Georgia Estate, and permanently deprives their mother's estate of its property rights, and allow spouses to circumvent community property laws by manipulating community earnings to deprive a spouse of her constitutional share after seventeen years of marriage.

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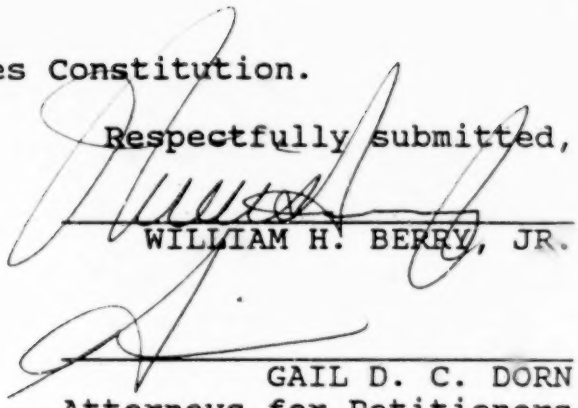
[13] See Atkins v. U.S., 556 F.2d 1028, cert. denied, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 75 (1977); Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930).

CONCLUSION AND PRAYER

Petitioners move this honorable Court to grant Writ of Certiorari, and after hearing oral argument and considering the briefs, order Texas to uphold the Seventh Amendment and Fourteenth Amendment of the United States Constitution and enter judgment on the favorable jury findings. Petitioners further move this honorable Court to order Texas to grant Petitioners equal protection with other Texas Citizens to have this matter considered before a full panel on appeal in the Texas Appellate Court system. Petitioners further move this Court to order Texas to allow Petitioners to recover one half the monies distributed under the Briner stock repurchase buy sell agreement and to distribute to Petitioners the Lorene E. Nee Estates separate property, and for all other relief to which Petitioners are entitled to receive under the Seventh Amendment and the Fourteenth Amendment

of the United States Constitution.

Respectfully submitted,



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II. APPENDIX

1. **THIRTEENTH COURT OF APPEALS OPINION WHOSE DECISION IS SOUGHT TO BE REVIEWED**

COURT OF APPEALS

Thirteenth Judicial District

Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Appeals, Thirteenth Judicial District of Texas, at Corpus Christi, as of the 1st day of February, 1990. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a Motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 13-88-523-CV (Tr. Ct. No. 26372-1)

THE INTERNATIONAL BANK OF CORPUS CHRISTI, ADMINISTRATOR OF THE ESTATE OF JOHN W. NEE, DECEASED, ET AL., Appellants,

V.

PAUL J. ERLANDSON, INDEPENDENT EXECUTOR OF THE ESTATE OF LORENE E. NEE, DECEASED, ET AL. Appellees,

on appeal to this Court from Nueces County, Texas.

* * * * * * * * *

J U D G M E N T

On appeal from the County Court at Law No. 1 of Nueces County, Texas, from a judgment signed June 30, 1988. Opinion by Justice Norman L. Utter. Justice J. Bonner Dorsey not participating. Opinion ordered published. Tex. R. App. P. 90.

THIS CAUSE was submitted to the Court on September 13, 1989, on oral argument, the record and briefs. These having been examined and fully considered, it is the opinion of the Court that there was some error in the judgment of the court below, and said judgment is hereby REVERSED and REMANDED.

Costs of the appeal are hereby judged against appellees, PAUL J. ERLANDSON, INDEPENDENT EXECUTOR OF THE ESTATE OF LORENE E. NEE, DECEASED, ET AL. It is further ordered that this decision be certified below for observance.

* * * * * * *

BETH A. GRAY, CLERK

NUMBER 13-88-523-CV

COURT OF APPEALS

THIRTEENTH JUDICIAL DISTRICT OF TEXAS

CORPUS CHRISTI

* * * * * * * *

THE INTERNATIONAL BANK OF CORPUS CHRISTI, ADMINISTRATOR OF THE ESTATE OF JOHN W. NEE, DECEASED, ET AL., APPELLANTS,

v.

PAUL J. ERLANDSON, INDEPENDENT EXECUTOR OF THE ESTATE OF LORENE E. NEE, DECEASED, ET AL., APPELLEES.

* * * * * * * *

On appeal from the County Court at Law No. 1 of Nueces County, Texas

* * * * * * * *

Before Norman L. Utter; Noah Kennedy; and J. Bonner Dorsey, J.J.

* * * * * * * *

O P I N I O N

The appellants, heirs of John W. Nee and the International Bank of Corpus Christi as the independent administrator of his estate, appeal a partition suit and suit for a declaratory judgment which

divided property between the estates of John W. and Lorene Nee. The present suit was originally brought by John W. Nee, as the surviving husband, against Paul Erlandson, the executor of the estate of his late wife, Lorene Nee, for partition of separate and community property. Erlandson filed suit in the district court against John W. Nee and the Nees for a declaratory judgment to determine the rights of the parties. The declaratory judgment action was transferred and the suits were consolidated in probate court as matters incident to the estate of Lorene Nee. John W. Nee died and was replaced by the administrator of his estate, the International Bank of Corpus Christi (Bank), and his children by a prior marriage (Nees) were added as parties to the suit. Lorene Nee's children by a prior marriage (Erlandsons) were subsequently

added as parties together with the executor of her estate. After a jury trial, the court partitioned the assets and awarded monetary damages and costs to the Erlandsons. The Bank and the Nees appeal by thirty-two points of error. The Erlandsons bring eight crosspoints. We reverse the judgment of the trial court and remand this case for a disposition of the assets of the estate in accordance with this opinion.

John W. Nee began work as a chemist for Briner Paint Manufacturing Company in 1949, when it first incorporated. He acquired 2,000 shares of its stock in 1964 prior to his marriage to Lorene. Later, after his marriage to Lorene, John acquired another 100 shares in 1974 and 100 in 1980, bringing the total to 2,200. When he received the shares, John was required to enter into a buy and sell agreement with

the corporation upon his death or retirement. At the time John retired and shortly before Lorene died, Briner repurchased its stock for $1,028,522.00 consisting of a down payment at the time of purchase and five annual installments. The money was deposited in the couple's joint bank account. When Lorene died in May 1984, she gave the residue of her estate to the Erlandsons. The primary question at trial and on appeal is whether the proceeds from the resale of the 2,000 shares of this stock were community property, to be divided between both John's and Lorene's heirs, or John's separate property. The Erlandson's contend that John accepted a lower salary over the years in exchange for growth in value of the 2,000 shares of stock that he acquired before marriage, which ultimately created tax savings at retirement. They contend that the proceeds

from the sale of the shares were actually a form of deferred compensation to the community.

JURISDICTION

Appellees initially challenge the jurisdiction both of the trial court and of this court on the grounds that the appellants failed to file either the bonds required by statute to institute the actions for partition or the appeal bond, that appellants' causes of action for partition did not survive John W. Nee's death, and that appellants had no standing to sue for partition. We first address the appellee's challenge to the jurisdiction of this court over the Nee appellants on the ground that they did not properly perfect their appeal by posting a bond within the requisite period of time.

In its capacity as administrator of the estate of John W. Nee, the Bank was

exempt from posting an appeal bond under the provisions of Tex. Prob. Code Ann. § 29 (Vernon 1980). The Bank perfected its appeal merely by giving notice of appeal to the trial court. However, the Bank further sought to perfect an appeal on behalf of the individual Nee appellants by depositing with the county clerk $1,000 in lieu of a bond on behalf of "all appellants," in accordance with Tex. R. App. P. 40 and 41. In their brief appellees challenged this Court's jurisdiction over the Nees on the ground that nothing had been filed naming them individually as appellants. Appellants then made a motion for leave to amend the county clerk's certificate as to cash in lieu of bond, in order to clearly designate the Nees individually as the "appellants" on whose behalf the deposit was made. Appellees opposed the motion and moved to dismiss the Nee appellants.

Tex. R. App. P. 46(f) provides that, "[o]n motion to dismiss an appeal or writ of error for a defect of substance or form in any bond or deposit given as security for costs, the appellate court may allow the filing of a new bond or the making of a new deposit in the trial court on such terms as the appellate court may prescribe." It is clear that the clerk's certificate showing that the proper deposit was made by one appellant may be amended show that it was also made for the benefit of other appellants not specifically named in the original certificate. Woods Exploration and Producing Co. v. Arkla Equipment Co., 528 S.W. 2d 568, 570 (Tex. 1975); Kimberly Development Corp. v. First State Bank of Green Bayou, 404 S.W. 2d 631, 633-34 (Tex. Civ. App.--Houston 1966, writ ref'd n.r.e.); see also Jinkins v. Bryan, 733 S.W.2d 268, 269 (Tex. App.--Amarillo

1987, no writ). It appears from the present record that the Bank clearly intended to include the Nees as appellants by posting a deposit on behalf of "all appellants." We, therefore, granted leave to file the amendment and denied appellee's motion to dismiss. Having received a copy of the amended certificate naming the Nees individually as appellants, we assumed jurisdiction over all parties.

We next address appellees' claim that appellants failed to post certain bonds required for partition under Tex. Prob. Code Ann. § 373(a), 385 and 386 (Vernon 1980). Specifically, appellees complain that John W. Nee never posted the bond required to maintain an action under section 385(b), which provides that "[t]he survivor shall execute and deliver to the judge of said court a bond . . . for an amount equal to the value of the survivor's

interest in such community property, conditioned for the payment of one-half of all debts existing against such community property . . ." Appellees argue that his failure to post a bond deprived the probate court of jurisdiction over the partition action. If appellees are correct, this Court would have no jurisdiction but to reverse the judgment ordering partition and instruct the probate court to dismiss the action for lack of jurisdiction.

However, we can find nothing in section 385 to suggest that the filing of a bond is necessary before the probate court may assume jurisdiction over the community property partition action. As appellants point out, the value of the husband's half of the community property by which the bond itself is measured under section 385 must first be determined by the court before the surviving spouse is able

to post bond. Surely, the spouse may file such an action and the probate court may assume jurisdiction even before the bond has been set. In addition, appellees have failed to direct us to, and we have found nothing in the provisions of sections 373 or 386 to require the filing of a bond in order to secure jurisdiction of the probate court over the partition actions brought in the present case.

Finally, we address appellees' complaints that appellants' causes of action for partition did not survive John W. Nee's death, and that appellants had no standing to sue for partition. The partition action was initially brought by John W. Nee individually; his children had no interest in the community and separate property sought to be partitioned at that time. When John died, his rights to that property passed to his estate and his

beneficiaries. Appellees contend, however, that the partition action abated at the time of John W. Nee's death and that the probate court then lost jurisdiction to proceed further.

Under Texas law, if a statute does not specifically address the survivability of a cause of action, the court must apply existing common law rules. Thomas v. Porter, 761, S.W.2d 592, 594 (Tex. App.--Fort Worth 1988, no writ). We note that an action for partition of property held in joint tenancy with right of survivorship generally abates with the death of a joint owner, because death vests title to the decedent's interest in the living owner, and the decedent's heirs have no interest left to partition. See Cobb v. Gilmer, 365 F.2d 931, 933 (D.C. Cir. 1966); Worden v. Thornburg, 564 S.W.2d 480, 485-86 (Tex. Civ. App--Corpus Christi 1978, writ ref'd

n.r.e.). However, where the decedent passes an interest in the property to his beneficiaries, the partition action should not be abated, but may continue on their behalf. See Clingerman v. Sadowski, 519 A.2d 378 (Pa. 1986); Terwilliger v. Terwilliger, 293 A.2d 12 (Conn. C.P. 1971). In the present case, any interest that John W. Nee possessed in the community property owned jointly with Lorene during their marriage, along with John's separate property, passed to his estate and his beneficiaries at the time of his death. The pending action for partition of that interest, therefore, survived and was revived in favor of his estate and his beneficiaries. The question remains, however, under what statutory basis the administrator and beneficiaries had standing to revive the action.

Tex. Prob. Code Ann. §§ 373(a), 385

and 386 (Vernon 1980) all provide statutory causes of action for the partition and distribution of the estates of decedents. Section 373(a) provides a cause of action for the executor or administrator, or the heirs or beneficiaries of the estate to be partitioned. Section 385 provides for partition of community property by a surviving spouse. Finally, section 386 provides for the partition of jointly owned property by any person having a joint interest with the estate of the decedent.

Under Texas law, death of one spouse terminates the community and divides the community property into two equal undivided interests, one going to the surviving spouse and the other to the deceased spouse's estate. Bright's Estate v. United States, 619 F.2d 407 (5th Cir. 1980), on rehearing, 658 F.2d 999 (5th Cir. 1981); Caddell v. Lufkin Land & Lumber Co., 255

S.W.2d 397 (Tex. Comm'n App. 1923, judgment adopted); see also Harrell v. Harrell, 692 S.W.2d 876 (Tex. 1985). When Lorene Nee died the "community" estate ceased to exist and all property belonging to the community became the jointly owned separate property of the surviving spouse and the decedent's estate.

Thus, when section 385 speaks of community property, we interpret this to refer to that separate property which formerly belonged to the community during the term of the marriage. Section 385 provides specifically for the surviving spouse to have this particular jointly owned separate property partitioned. Section 386, provides generally for all others who may have a joint interest in property with the decedent to have their interests partitioned.

Though under Section 385 no one but

the surviving spouse may have had standing to partition the property formerly belonging to the community, after John W. Nee's death, the bank as the administrator of his estate and the Nees as his beneficiaries had standing under Section 386 to partition his separate property jointly owned with Lorene's estate, including the property that formerly belonged to the community. We hold that appellants had standing to maintain the present partition action and that both the trial court and this Court have jurisdiction.

SEPARATE PROPERTY

By their first three points of error appellants complain that the trial court erred in disregarding the jury's finding that the 2,000 shares of stock were acquired before marriage, and in submitting or failing to disregard as irrelevant the

jury's finding that the monies used to purchase the shares were deferred compensation.

By the first through fourth special issues regarding the Briner stock itself, the jury found that 2,000 shares were issued to John W. Nee prior to his marriage to Lorene Nee, that during the term of their marriage the value per share of the stock rose from $25.00 to $467.57, that 60% of the efforts and actions of John W. Nee during the time of the marriage contributed to the increase in value of the Briner stock and 10% was reasonably necessary to manage and preserve his separate estate, and that the monies paid for the 2,000 shares of Briner stock represent deferred compensation from Briner to John W. Nee. By the fifth through seventh special issues regarding John W. Nee's compensation, however, the jury found that $1,269,890

would have been reasonable total compensation to John W. Nee by Briner for his services during the term of his marriage to Lorene, and that during this term John W. Nee received $1,254,890 in compensation from
Briner, plus fringe benefits worth $15,000.

The trial court entered judgment that the 2,000 shares were community property based on the jury's findings and the Erlandson's theory that the value of the shares was enhanced during the term of the marriage as a form of deferred compensation for John W. Nee's continued employment with the corporation. The trial court also noted that the appellants requested no findings tracing the proceeds from the sale of stock through their subsequent permutations; thus, even if the stock had been John W. Nee's separate property, the community property presumption applied to

the proceeds in their present form.

We first address the nature of the increased value of this stock and the right of the community to reimbursement for efforts expended thereon. In both Vallone v. Vallone, 644 S.W.2d 455, 459 (Tex. 1982) and Jensen v. Jensen, 665 S.W.2d 107, 109 (Tex. 1984), the Texas Supreme Court adopted the reimbursement theory concerning increases in stock value due to the time and effort of a spouse during marriage. Under this theory, the stock itself remains the property of the owner spouse, but the community is entitled to reimbursement for the reasonable value of the time and effort of the spouse which contributed to the increase in value of the stock, other than that reasonably necessary to manage and preserve the separate estate, less the remuneration already received in the form of salary and other benefits. See also

Rogers v. Rogers, 754 S.W. 2d 236, 239 (Tex. App.--Houston [1st Dist.] 1988, no writ); Holloway v. Holloway, 671 S.W.2d 51, 58 (Tex. App.--Dallas 1983, writ dism'd). The Court suggested that this rule would obviate the need to determine what factors actually contributed to an increase in the value of stock and in what proportion, since a finding that the shareholder-employee spouse was adequately and reasonably compensated for his time and effort precludes the other spouse from claiming a right to reimbursement on behalf of the community. Jensen, 665 S.W.2d at 109-110; Vallone, 644 S.W.2d at 459; Holloway, 671 S.W.2d at 58. The burden to prove a right to reimbursement, moreover, is upon the claimant.

Jensen, 655 S.W.2d at 110; Vallone 644 S.W.2d at 459.

In the present case, by their answers

to the fifth through seventh special issues, the jury found that John W. Nee received reasonable compensation for his efforts in the form of salary and other benefits during the term of the marriage. There is no need for us to further analyze the jury's answers regarding the degree to which John W. Nee's efforts contributed to the value of the stock or the characterization of the monies paid in resale as deferred compensation. As the Court made clear in Jensen, Vallone and Holloway, once reasonable compensation is found, there is no longer any right to reimbursement. We hold, therefore, that the 2,000 shares of stock were the separate property of John W. Nee and no right of reimbursement exists on behalf of Lorene Nee's estate for the increase in value. We sustain appellant's first through third points of error.

TRACING

We now turn to the question of whether the court erred in failing to trace the funds received for that stock. By their fourth through sixteenth points of error, appellants complain generally that the trial court erred in failing to trace John W. Nee's separate property interest in the proceeds from the sale of the 2,200 shares of Briner stock, 2,000 of which John W. Nee owned as his separate property. By their fourth, eleventh through thirteenth and sixteenth points of error, appellants contend specifically that the evidence is conclusive and uncontroverted as a matter of law that John W. Nee's separate property interest must be traced to the down payment and note in payment for the stock, to the account in which the down payment was deposited, and to certain municipal income trust (MIT) bonds that were subsequently

purchased from funds in that account.

As we stated in our discussion of appellant's first through third points of error, the trial court erred in failing to acknowledge 2,000 shares as John W. Nee's separate property. Appellants here argue that as a matter of law 90.91% of the proceeds from the sale of that stock were John W. Nee's separate property. We agree.[1]

Briner purchased the stock with a down payment of $257,130.50 on April 10, 1984, and a promissory note to be paid off in five equal yearly installments of $183,125.56 each on April the 10th of the following five years. Certified Public Accountant Robert Hamilton, who was the only expert to trace John Nee's separate

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[1]We note that John W. Nee's 2,000 separately owned shares divided by the total 2,200 shares sold to Briner equals 0.9090909, or approximately 90.91%.

property through the bank transactions, testified that he had been Briner's accountant since 1972 and is familiar with the promissory note given to John W. Nee for the sale of his 2,200 shares of stock. Hamilton specifically calculated the community and separate property rights to the principal and interest on each installment of the note.

The principal amounts are clearly traceable to the original percentages of separate or community ownership of the shares of stock. However, the interest on a note owned as the separate property of one spouse constitutes community income when it has accrued during the term of the marriage. See Arnold v. Leonard, 273 S.W.2d 799 (Tex. 1925); Braden v. Gose, 57 Tex. 37 (1882); Lesage v. Gateley, 287 S.W.2d 193, 196 (Tex. Civ. App.--Waco 1956, writ dism'd). Accordingly, Hamilton

allocated the interest accruing before Lorene's death entirely to the community, and divided all the principal and that portion of the interest accruing after Lorene's death 90.91% as John W. Nee's separate property and 9.09% to the community.[2]

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[2]The five $183,125.56 installments on the note and the division of interest and principal therein is set forth in the note itself as follows:

Payment Date	Principal	Interest
April 10, 1985	$136,842.08	$46,283.48
April 10, 1986	$145,052.60	$38,072.96
April 10, 1987	$153,755.76	$29,369.80
April 10, 1988	$162,981.11	$20,144.45
April 10, 1989	$172,759.95	$10,365.61

All of the principal payments and the interest payments for the years following Lorene's death are divided according to the percentages of separate and community ownership of the Briner stock: principal payments totaling $771,391.50 are $701,272.01 separate property and $70,119.49 community; interest accrued since April 10, 1985, totaling $97,952.82, is $89,048.91 separate property $3,903.91 community.

The $46,283.48 in interest accrued during the year Lorene died, however,

Appellees argue, however, that the present periodic interest payments became community property at the time the note was made because the note itself specified the right to these payments. Appellees attempt to combine the rule that interest accrued during marriage is community property with the rule that the character of property as community or separate is determined at the inception of title when the right to the property first arises by virtue of which title is finally vested. Pettitt v. Pettitt, 704 S.W.2d 921, 924 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.). The present note, however, merely

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must be divided between the $6,467.01 portion which accrued during the 51 day period before her death and belongs entirely to the community, and the $39,816.47 portion which accrued during the 314 day period after her death, of which $36,197.15 is John's separate property $3,619.32 belongs to the community.

specified the terms by which interest would be calculated and paid in the future. A right to the specified interest payments did not arise or accrue until after they had been earned over the course of time. Under the terms of the note itself, moreover, Briner could pay off the balance at any time, and thereby avoid these payments.

That portion of the note which was the separate property of John W. Nee, therefore, earned interest which was also Nee's separate property after Lorene's death. Only that portion of the interest earned after Lorene's death which accrued on the community property portion of the principal was jointly owned by the present parties. See Fox v. Smith, 531 S.W.2d 654, 656 (Tex. Civ. App.--Waco 1975, no writ). Hamilton's calculations correctly divided the principal and interest between the

parties.

Appellants also complain that the court erred in failing to trace the separate property portion of the down payment on the note through its various permutations. At trial appellants presented evidence in the form of bank statements and Hamilton's testimony that John W. Nee's separate property interest in the down payment could be clearly traced through the couple's joint bank account and the subsequent purchase of the MIT bonds.

Under Tex. Fam. Code Ann. § 5.02 (Vernon Supp. 1989), property possessed by either spouse during or on dissolution of marriage is presumed to be community property, and the party claiming it as separate has the burden to overcome this presumption by clear and convincing evidence. Estate of Hanau v. Hanau, 730 S.W.2d 663, 667 (Tex. 1987); Tarver v.

Tarver, 394 S.W.2d 780, 783 (Tex. 1965); Harris v. Harris, 765 S.W.2d 798, 802 (Tex. App.--Houston [14th Dist] 1989, writ denied). To discharge this burden a spouse must trace and clearly identify the property claimed as separate. If separate property and community property have been so commingled as to defy resegregation and identification, the statutory presumption prevails. However, when separate property has not been commingled or its identity as such can be traced, the statutory presumption is dispelled. Hanau, 730 S.W. 2d at 667; Tarver, 394 S.W.2d at 783; Harris, 765 S.W.2d at 802. So long as separate property can be definitely traced and identified it remains separate property regardless of the fact that the separate property may undergo mutations and changes. Norris v. Vaughan, 260 S.W.2d 676, 679 (Tex. 1953).

Specifically, our courts have found no difficulty in following separate funds through bank accounts. Sibley v. Sibley, 286 S.W.2d 657, 659 (Tex. Civ. App.--Dallas 1955, writ dism'd). A showing that community and separate funds were deposited in the same account does not divest the separate funds of their identity and establish the entire amount as community when the separate funds may be traced and the trial court is able to determine accurately the interest of each party. Holloway v. Holloway, 671 S.W.2d 51, 60 (Tex. App.--Dallas 1983, writ dism'd); Harris v. Ventura, 582 S.W.2d 853, 855 (Tex. Civ. App--Beaumont 1979, no writ). One dollar has the same value as another and under the law there can be no commingling by the mixing of dollars when the number owned by each claimant is known. Trawick v. Trawick, 671 S.W.2d 105, 110

(Tex. App.--El Paso 1984, no writ); Farrow v. Farrow, 238 S.W.2d 255, 257 (Tex. Civ. App.--Austin 1951, no writ).

Our courts have developed rules of tracing to distinguish the character of funds which are withdrawn from an account of mixed separate and community funds. The community moneys in a joint bank account of the parties are presumed to have been drawn out first, before the separate moneys are withdrawn. Ventura, 582 S.W.2d at 855-56; Sibley, 286 S.W.2d at 659. Therefore, if sufficient funds remain in the account at all times to cover the separate property interests of the parties, then those funds remain separate property. See Farrow.

In the present case, Hamilton traced the down payment from the stock sale through MBank account no. 651-959-8, determining the percent and amounts of community and separate ownership of the

funds in each transaction affecting the account. The $257,130.50 down payment was deposited in the couple's MBank joint account no. 651-959-8, which already contained community funds of $125,258.89 making the new total $382,389.32. Bank records documented numerous transactions, and Hamilton calculated the amount of separate and community funds that remained in the account after each.[3] The account

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[3] The account had a $125,258.89 balance as of April 10, 1984. On that date, the $257,130.50 down payment on the stock sale was deposited to the account, which then contained a $382,389.39 balance, $233,757.34 separate and $148,632.05 community. The following transactions occurred:

A. On April 16, 1984, $9,000 was transferred to a checking account, leaving a $373,389.39 balance, $233.757.34 separate and $139,632.05 community;

B. On April 30, 1984, the couple purchased 150 shares of series no. 112 MIT bonds for $150,000 from the account, leaving a $233,389.39 balance, all John W. Nee's separate property;

C. On May 1, 1984, interest on the account of $2,227.49 and on May 2, 1984 other interest of $365.74 earned on cer-

contained a balance of $60,752.39 at the time the marriage was terminated on Lorene's death. If evidence of the character of the funds deposited to an

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tificates of deposit held by the couple, was credited to the account, leaving a $225,982.62 balance, $223,389.39 separate and $2,593.23 community;

D. On May 14, 1984, $1,000 was transferred to a checking account, leaving a $224,982.62 balance, $223,389.39 separate and $1,593.23 community;

E. On May 22, 1984, a $2,200 check was drawn on the account, leaving a $222,782.62 balance, all John W. Nee's separate property;

F. On May 22, 1984, the couple purchased 150 shares of series no. 68 MIT bonds for $162,505.50 from the account, leaving a $60,277.12 balance, all John W. Nee's separate property;

G. On May 23, 1984, $1,000 was transferred to a checking account, leaving a $59,277.12 balance, all John W. Nee's separate property; and

H. On June 1, 1984, interest on the account of $1,278.01 and on the certificates of deposit of $197.26 was deposited to the account, leaving a $60,752.39 balance, $59,277.12 separate and $1475.27 community. (Although Lorene Nee died on May 31, 1984, appellants concede for the sake of simplicity that the interest payments calculated up until June 1, 1984 were community.)

account and all transactions affecting the account is precise and uncontradicted, then as a matter of law, the separate funds must be traced through the account, regardless of how tedious and subject to complicated mathematical calculations this may be. See Trawick, 671 S.W.2d at 110-11; Carriere v. Bodungen, 500 S.W.2d 692, 697 (Tex. Civ. App.--Corpus Christi 1973, no writ). Hamilton's tracing of the bank accounts was precise and uncontradicted.

In addition, when separate funds can be traced through a joint account to specific property purchased with those funds, without surmise or speculation about the nature of those funds deposited and withdrawn from the account in the interim, then the purchases remain separate property. See McKinley v. McKinley, 496 S.W.2d 540, 543-44 (Tex. 1973); DePuy v.

DePuy, 483 S.W.2d 883, 887-88 (Tex. Civ. App.--Corpus Christi 1972, no writ); cf. Hanau, 730 S.W.2d at 667 (tracing mandatory where the evidence clearly showed that the funds received from the sale of husband's separate property were immediately used to purchase other stock of like value). The bank statements and Hamilton's testimony indicate that on two separate occasions the couple purchased 150 MIT bonds with funds in the joint account.[4] To the extent that the funds used to purchase these bonds were the separate property of John W. Nee, the bonds also became his separate property. The trial court erred in holding that John Nee's separate property was not properly

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[4] The Series no. 112 bonds purchased on April 30, 1984 for $150,200.00 were paid for with $10,567.95 in John W. Nee's separate funds and $139,632.05 in community funds. The series no. 68 bonds purchased on May 22, 1984 for $162,505.50 were paid for entirely out of John W. Nee's separate funds.

traced. Appellants' fourth through sixteenth points of error are sustained.

REIMBURSEMENT

By their seventeenth through nineteenth points of error, appellants complain that the trial court refused to submit their issue on reimbursement for John W. Nee having used his separate funds to pay both Lorene Nee's funeral expenses and the couple's 1984 federal income taxes, that the jury failed to find a right to reimbursement in response to the issues submitted, and that the trial court failed to render judgment granting reimbursement.

When community funds are expended to reduce a separate debt, the community is entitled to reimbursement. Colden v. Alexander, 171 S.W.2d 328, 334 (Tex. 1943); Dakan v. Dakan, 83 S.W.2d 620, 627 (Tex. 9135); Martin v. Martin, 759 S.W.2d 463,

465 (Tex. App.--Houston [1st Dist.] 1988, no writ). Likewise, when appellant uses his separate funds to extinguish a community debt or a separate debt of his spouse, he has a claim for reimbursement against the community or the spouse's estate, respectively. See Dakan, 83, S.W.2d at 627; Hilton v. Hilton, 678 S.W.2d 645, 648 (Tex. App.--Houston [14th Dist.] 1984, no writ). Appellants must show the character both of the debt and of the funds used to pay off the debt.

As we stated in response to points four through sixteen MBank account no. 651-959-8 had a balance of $60,752.39 on June 1, 1984, the day after Lorene died. Hamilton testified that he continued to trace John W. Nee's separate funds through that account subsequent to Lorene Nee's death, in like manner to his tracing of the funds through transactions occurring before

Lorene's death. Based on Hamilton's testimony tracing John W. Nee's separate property proceeds, appellants contend they proved as a matter of law that his estate is entitled to reimbursement for half the $37,744.83 amount paid on the community tax liability and for the entire $10,035.61 amount paid on Lorene's funeral. We will first discuss the expenses allegedly incurred by John W. Nee for Lorene's funeral.

Tex. Prob. Code Ann. §320A (Vernon 1980) provides that executors and administrators shall charge funeral expenses to the decedent's estate and not to the community share of a surviving spouse. However, where the amount is challenged by the estate, one asserting for a claim for funeral expenses must also prove that it is reasonable and appropriate under the circumstances. Roberts v.

Schooler-Gordon Funeral Directors, Inc., 712 S.W.2d 646, 647-48 (Tex. App.--Amarillo 1986, writ ref'd n.r.e.); Goeth v. McCollum, 94 S.W.2d 781, 783 (Tex. Civ. App.--San Antonio 1936, no writ); Tex. Prob. Code Ann. §320 & 322 (Vernon Supp. 1989).

In the present case, the Nees attempted to trace John W. Nee's separate funds through MBank account no. 651-959-8 to a $15,000 transfer on June 6, 1984 to MBank account no. 275-810-5 from which John W. Nee paid for Lorene's funeral. Hamilton testified that a check for $10,035.61 was written on the latter account for the funeral expenses. However, appellants do not direct us to any other evidence showing how they trace John W. Nee's separate property through the latter account, the character of the funds in the account, that these funds were actually spent on

legitimate funeral expenses or what exactly those expenses were. The evidence, therefore, did not show that the Nees are entitled to reimbursement for whatever unspecified "funeral expenses" they may have claimed. Nor can we assume that the separate property funds transferred to that account are the same funds withdrawn to pay funeral expenses. It is not enough to show that separate funds could have been the source of a subsequent expenditure. See Latham v. Allison, 560 S.W.2d 481, 485 (Tex. Civ. App.--Fort Worth 1977), writ ref'd n.r.e.). The evidence shows neither that the separate funds were properly traced nor that the funds actually withdrawn were used for legitimate and reasonable funeral expenses.

As for the claim that the community liability for 1984 federal income taxes was discharged with separate funds, appellants

again point to Hamilton's testimony tracing John W. Nee's separate funds through MBank account no. 651-959-8 to certain tax payments. Hamilton contended that the majority of the couple's 1984 tax liability accrued before Lorene's death, and is therefore a community obligation. Debts incurred during marriage are presumed to be community obligations. Mortenson v. Trammell, 604 S.W.2d 269, 275 (Tex. Civ. App.--Corpus Christi 1980, writ ref'd n.r.e.). In particular, the obligation to pay federal taxes on income which has been earned during the marriage is treated as a community debt. Able v. Able, 725 S.W.2d 778, 780 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.); Gaulding v. Gaulding, 256 S.W.2d 684, 688 (Tex. Civ. App.--Dallas 1953, no writ).

In the present case, however, because tax liability was incurred both before and

after Lorene's death terminated the marriage, we cannot presume that any certain amount was a community obligation. Neither have appellants pointed us to any means within the evidence of distinguishing that portion of the liability which arose before Lorene's death on community income from that portion which arose afterwards or on separate income. Appellants have not segregated those portions of the tax liability attributable to John W. Nee's separate income, which represent his separate debt, from those portions attributable to the community income, which represent community debt.[5] Therefore, we

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[5]From the 1984 tax returns included in the evidence, we can speculate that the majority of John W. Nee's income for that year was the capital gain he realized on the sale of the stock, and that most of his other income was probably earned before he retired from Briner in the early part of that year. However, appellants have failed to point the trier to any accurate means of determining that

cannot say that the evidence conclusively established the Nees' entitlement to reimbursement in any certain amount.

Finally, appellants argue that the trial court refused to submit their requested special issue inquiring whether Jchn W. Nee expended $37,744.83 of his separate funds on the community federal tax indebtedness and $10,035.61 of his separate funds on Lorene Nee's funeral expenses. Instead, the trial court submitted Special Issue 28, inquiring simply whether John W. Nee had paid community debts with his separate funds subsequent to Lorene's death, which the jury found he had not. Special Issues 29 & 30 asked if, and in what amount, the Nees were entitled to reimbursement for the payment of these community debts. However, because Special

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portion of the tax liability which became an obligation of the community.

Issues 29 & 30 were contingent upon an affirmative finding to Special Issue 28, the jury did not answer them.

The evidence was convoluted and unclear about the exact amount of reimbursement, if any, to which appellants were entitled. Had the amount of recovery been established as a matter of law, no issue should have been submitted to the jury. See Minor v. Gross, 478 S.W.2d 597, 600 (Tex. Civ. App.--Tyler 1972, writ ref'd n.r.e.). Where the exact amount of recovery is not conclusively proven, however, that amount must be left to the sound judgment and discretion of the jury. See Nickel v. Snider, 484 S.W.2d 940, 943 (Tex. Civ. App.--Corpus Christi 1972, writ ref'd n.r.e.). In either case, it would have been improper to submit the issue requested by appellants, which offers simply a yes or no choice of finding an

already specified amount for reimbursement. Appellants' seventeenth through nineteenth points of error are overruled.

LORENE NEE'S ESTATE

By points of error twenty and twenty-three, appellants complain that the trial court erred in awarding to Lorene Nee's estate the entire amounts in Navy Army Federal Credit Union Account 20989 and Merrill Lynch Cash Management Account 532-45782, respectively, as her separate property at the time of death, because there was no evidence or insufficient evidence to overcome the community property presumption. In response to Special Issues 9 and 10, the jury found that $25,000 deposited in a certificate of deposit and $8,609 deposited in a checking account under the Navy Army account were the separate property of Lorene Nee at the time of her death. In response to Special

Issues 11 and 12, the jury found that $38,388 deposited in the Merrill Lynch account was the separate property of Lorene Nee at the time of her death. The trial court rendered its verdict accordance with the jury's verdict.

Under Tex. Fam. Code Ann. §5.02 (Vernon Supp. 1989), the burden is on the party asserting the separate character of property possessed by either spouse at the termination of the marriage to overcome the community presumption by clear and convincing evidence. See Tarver v. Tarver, 394 S.W.2d 780, 783 (Tex. 1965); Wilson v. Wilson, 201 S.W.2d 226, 227 (Tex. 1947).

Paul Erlandson testified that his father, Earl Erlandson, died in 1961, leaving an estate of approximately $125,000 to his mother,
Lorene, who later married John W. Nee in 1967. Some of the original funds had been

spent by Lorene on her children's education and the home she purchased in Corpus Christi, Texas. Of the remaining amounts, Erlandson attempted to trace those assets and funds which he claimed that his mother clearly identified as her separate property through various transactions to the present Navy Army and Merrill Lynch accounts.

The Erlandsons relied upon a 13 page summary Paul Erlandson prepared from their mother's records to support their theory of tracing, citing Skinner v. Skinner, 202 S.W.2d 318 (Tex. Civ. App.--San Antonio 1947, no writ) as authority for this method of tracing. However, Skinner, 202 S.W.2d at 319, utilized an audit that clearly documented the path of the parties' separate property through the bank accounts maintained in that case. See also Lindsey v. Lindsey, 564 S.W.2d 143, 146 (Tex. Civ. App.--Austin 1978, no writ).

The tracing summary upon which the Erlandsons rely in the present case appears to be nothing more than an assortment of individual and unconnected deposits and withdrawals of funds and securities to and from various entities. It does not show a consistent evaluation of the transactions affecting either of the two accounts through which Erlandson sought to trace Lorene Nee's separate property interests.

In fact, the Navy Army account is mentioned only once at the end of the summary, where balances showing the present amounts claimed in the C.D. and checking account are recorded. There are no other entries showing the source, amounts or dates of the deposits to this account which contributed to the final balances.

With the Merrill Lynch account, there is a final balance and one other loan entry showing a deposit on November 9, 1981 of

$20,760. This may have been transferred from the Merrill Lynch Ready Assets Trust, which is listed immediately above as having been closed out by withdrawal of $20,773.10 on November 6, 1981. However, the source of the funds in the trust is a deposit on January 8, 1980 of $19,951 from the sale of stocks which are not further identified.

In short, the summary upon which Erlandson relies as clear and convincing evidence tracing his mother's separate property is manifestly unclear. The summary evidence offered by Erlandson was insufficient for the fact finder to accurately trace the funds. See McKinley v. McKinley, 496 S.W.2d 540, 543-44 (Tex. 1973); Snider v. Snider, 613 S.W.2d 8, 10 (Tex. Civ. App.--Dallas 1981, no writ).

In addition, with regard to the Navy Army account, appellees also claim that John W. Nee somehow waived his right to

claim any of the account as community property by signing a waiver on certain life insurance on Lorene Nee, which was apparently offered through membership in the Navy Army Federal Credit Union, allowing Lorene to name her children as beneficiaries. In response to Special Issue 8, the jury found that John W. Nee did not intend to waive any community interest in the Navy Army account when he signed the card. Neither do we see any connection between the waiver of beneficiary designation and the character of funds in the Navy Army account.

Appellants' twentieth and twenty-third points of error are sustained. In view of our disposition of these points, we need not address point twenty-one.

By their twenty-second point of error, appellants complain that the evidence was insufficient to overcome the presumption

that a $229 Civil Service Retirement Lump Sum payment was community property. State community

property laws, however, are preempted by federal law governing civil service retirement benefits, 5 U.S.C. §8331, et seq., which allows the employee to make certain elections of benefits and beneficiaries without regard to community interests which might otherwise be imposed upon the employee's choice. See Valdez v. Ramirez, 574 S.W.2d 748 (Tex. 1978); Carreon v. Morales, 698 S.W.2d 241, 242-43 (Tex. App.--El Paso 1985, no writ). The trial court, in its judgment, awarded the entire amount equally to Paul Erlandson and Sandra Vander Erlandson, as named beneficiaries on the account. Appellants' twenty-second point of error is overruled.

ATTORNEY'S FEES

By the their twenty-fourth point of

error, appellants complain that the trial court erred in awarding attorney's fees to the Erlandsons. The general rule is that attorney's fees are not recoverable for prosecuting or defending a suit unless authorized by contract or statute, and each party bears the cost of its own attorney. Stewart v. Texco Newspapers, Inc., 734 S.W.2d 175 (Tex. App.--Houston [1st Dist] 1987, no writ); O'Connell v. Hitt, 730 S.W.2d 16 (Tex. App.--Corpus Christi 1987, no writ. Appellants argue that the suit originated and has remained one for partition, in which attorney's fees are not recoverable. See Green v. Doakes, 593 S.W.2d 762, 765 (Tex. Civ. App.--Houston [1st Dist] 1979, no writ). Appellees contend, however, that attorney's fees are proper under either the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code Ann. §37.009 (Vernon 1986), or Tex. Prob.

de Ann. §243 (Vernon Supp. 1989).

Probate Code section 243 provides for reasonable attorneys fee's for the executor of an estate which are expended in defending or admitting the will to probate, to be paid out of the estate. The attorney's fees in the present case were awarded against the community share of the estate of John W. Nee, not against the estate of Lorene E. Nee, of whom Paul Erlandson was the Independent Executor. Therefore, Probate Code section 243 has no application to the present award.

The Uniform Declaratory Judgments Act, section 37.009, provides that, "In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just." The question then becomes whether the present action can be characterized as a declaratory judgment

proceeding for purposes of awarding attorney's fees.

It is clear that a declaratory judgment action may be brought in order to determine the interests of the surviving spouse and/or heirs in community and separate property left after the death of the other spouse. McKinley v. McKinley, 496 S.W.2d 540, 542 (Tex. 1973); Hilley v. Hilley, 305 S.W.2d 204, 206 (Tex. Civ. App.--Waco 1957, writ ref'd n.r.e.).

However, the Declaratory Judgments Act is not generally available to settle disputes involving the same parties and issues which are already pending before a court. Texas Liquor Control Board v. Canyon Creek Land Corp., 456 S.W.2d 891, 895 (Tex. 1970); Perry v. Welch, 725 S.W.2d 347, 348 (Tex. App.--Corpus Christi 1987, no writ); Johnson v. Hewitt, 539 S.W.2d 239, 240-41 (Tex. Civ. App.--Houston [1st

Dist.] 1976, no writ); Joseph v. City of Ranger, 188 S.W.2d 1013, 1014 (Tex. Civ. App.--Eastland 1945, writ ref'd w.o.m.). When the plaintiff has brought a particular controversy before the court, for instance, the defendant cannot bring the same issues before the court in the form of a declaratory judgment counterclaim. See John Chezik Buick Co. v. Friendly Chevrolet Co., 749 S.W.2d 591, 594 (Tex. App.--Dallas 1988, writ denied); Perry, 725 S.W.2d at 348-49; Narisi v. Legend Diversified Investments, 715 S.W.2d 49, 1-52 (Tex. App.--Dallas 1986, writ ref'd n.r.e.); Joseph, 188 S.W.2d at 1014.

On December 19, 1984, John W. Nee filed his petition in Nueces County Court-at Law No. 1 for, among other things, a partition of the separate and community assets held jointly by himself and Lorene Nee's estate under Probate Code §§ 385 &

386. On September 27, 1985, Paul Erlandson, as executor of Lorene Nee's estate, filed a declaratory judgment action in 117th District Court also asking the court to declare the community or separate character of the property belonging to the couple. However, Erlandson later moved Nueces County Court at Law No. 1 and 117th District Court to transfer his declaratory judgment action to county court and consolidate it with the partition action as a matter incident to an estate. Erlandson's motions were granted and both actions consolidated under a single cause captioned the Estate of Lorene E. Nee, Deceased, et al.

In the present case, the Erlandsons' subsequent declaratory judgment action involved the same parties and raised the same issues as the Nees' pending action for partition. In addition, the relief

ultimately granted was in the nature of a partition of the property, rather than merely a declaration of rights. We agree with the appellants that the present action is in the nature of a partition rather than a declaratory judgment, and the Erlandsons are not entitled to attorney's fees. We sustain appellants' twenty-fourth point of error.

BUICK AUTOMOBILE

By their twenty-eighth point of error, appellants complain that the trial court erred in awarding one-half the value of a community-owned Buick automobile to appellees, because the wife's executor is already in possession of the entire value of the asset. The parties agree that Paul Erlandson, as executor of Lorene Nee's estate, collected and retained community property insurance proceeds on the Buick after it was destroyed in an accident. The

judgment itself simply recites that the $5,900 Buick was community property and awards $2,950, half of its value, to Lorene Nee's estate. If a monetary amount is before the court for partitioning, the court should award portions of that amount to the parties out of possession, to be paid by the party in possession of the original amount, not vice-versa. We sustain appellants' twenty-eighth point of error.

MIT BONDS

By their twenty-ninth point of error, appellants complain that the trial court failed to credit the John W. Nee estate with the value of a separate property distribution on the series no. 68 MIT bonds. Appellants argue that the evidence conclusively established that these bonds were the separate property of John W. Nee, and that Erlandson received a distribution

of principal and interest on the bonds and retained the funds in Lorene's estate.

Appellees claim that the appellants waived any error by failing to request a proper jury question to support a partition of the $1,773 distribution. No jury issue was submitted asking if any principal amounts on the bonds were returned, or any interest accrued after Lorene's death, to which John W. Nee's estate was entitled. However, as is evident from our discussion of points of error four through sixteen, the funds used to purchase the series no. 68 MIT bonds on May 22, 1984, were the separate property of John W. Nee. Eppler, Guerin & Turner, Inc. (Eppler) held the bonds, collected distributions on them, and paid out these distributions monthly to the Nees. The bonds themselves, the principal amounts returned, and any interest accrued after Lorene's death remained John W. Nee's

separate property. It is also undisputed that a distribution, consisting of a $387 return of principal and $1,386 in interest on the bonds for a stated period, was made by a $1,773 check on July 2, 1984 from Eppler to John W. and Lorene Nee, which was endorsed and retained by Paul Erlandson, as executor of Lorene's estate. The trial court is not required to submit an issue on an undisputed fact. Corpus Christi National Bank v. Lowry, 662 S.W.2d 402, 405 (Tex. App.--Corpus Christi 1983, no writ); Tex. R. Civ. P. 279. Therefore, it was unnecessary for the appellants to submit a jury question specifically tracing this distribution as John W. Nee's separate property, which the trial could should have done on its own initiative.

However, it appears that the recorded ending date for the interest payment was June 1, 1984, the day after Lorene's death.

This means that the majority of the accumulated interest accrued during May as the community property of the couple, and the trial court should have taken this into consideration in calculating the amounts to which the separate estates were entitled. See Arnold; Braden; Lesage, 287 S.W.2d at 196. We sustain appellants' twenty-ninth point of error.

HOUSEHOLD FURNISHINGS

By their thirty-second point of error, appellants complain that the trial court erred in awarding certain household furnishings to the Erlandsons, because there were no jury issues concerning ownership of the property to support the award.

The judgment orders delivery to Lorene Nee's executor of "that Miscellaneous property on Schedule F of Inventory of Lorene E. Nee Estate (household property

and personal belongings, etc.)," which is presently being held by the Nees. There is no dispute that some of the items listed on Schedule F were community property. The disagreement between the parties, however, concerns John W. Nee's intent to give his community interest in the household furnishings to the Erlandsons under a 1982 will, administration under which is pending in Nueces County Court at Law No. 3. Appellees would have the court bypass this separate administration altogether, by declaring the Erlandsons as beneficiaries of the 1982 will and entitled to all of the household furnishings as a matter of law, having inherited through both John and Lorene's estates.

The present action, however, was brought by the administrator of John W. Nee's estate, which, while such administration is pending, generally has

the exclusive right to recover assets for the benefit of the estate. See Glover v. Landes, 530 S.W.2d 910, 911 (Tex. Civ. App.--Houston [1st Dist.] 1975, writ ref'd n.r.e.). While John Nee's estate is subject to administration in another court, we will not recognize the Erlandson's claim to the property in dispute in this court under a will subject to probate in the former court. Since the evidence is conclusive that a portion of the household furnishings were community property and should have been partitioned between the estates, we sustain appellants' thirty-second point of error.

DESIGNATION OF PARTIES

By their thirtieth point of error, appellants complain that the trial court erred in redesignating the status of the parties to place the appellees in the position of plaintiffs at trial.

Appellants argue that they were thereby deprived of the right to open and close the evidence and arguments.

Tex. R. Civ. P. 265, 266 and 269, read together, provide generally that the plaintiff shall have the right to open and conclude both in adducing his evidence and in the argument, unless the burden of proof on the whole case rests on the defendants. See Horton v. Dental Capital Leasing Corp., 649 S.W.2d 655, 657 (Tex. App.--Texarkana 1983, no writ).

Tex. R. Civ. P. 174(a) provides that, "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

In making orders concerning the proceedings, the trial court has discretion, after examining the pleadings of the parties, to determine which of the original party plaintiffs will retain that status in the consolidated action and be given the right to open and close. See Lynch v. Fowler, 257 S.W.2d 948, 950 (Tex. Civ. App.--Texarkana, 1923, writ ref'd); 88 C.J.S. Trial § 43(e) (1955). However, in the absence of exceptional circumstances which would justify giving the right to another, the party plaintiff who first filed his cause of action must be given the right to open and close. See Lynch, 257 S.W.2d at 950; Grimm & Davis & Goldberg, 422 N.Y.S.2d 319, 321 (Civil Court of the City of New York 1979); 1A C.J.S. Actions § 215 (1985).

In the present case, appellants were the first to file their partition action.

In addition, as we discussed in response to point of error twenty-four, the later declaratory judgment action was improper from its inception because it raised the same issues as the pending partition action. Although the Erlandsons' original petition also asked for damages for conversion by the Nees of the property to be partitioned, this was merely incidental to the request for a declaration of rights to the property in question. The action clearly should have gone to trial as a partition suit with appellants retaining the right to open and close. We hold that the trial court abused its discretion in allowing the Erlandson's declaratory judgment to take precedence over the partition and the Erlandsons to be designated as plaintiffs.

However, the denial of this right must be calculated to cause and have probably

caused the rendition of an improper judgment in order to constitute reversible error under Tex. R. App. P 81(b). See Horton, 649 S.W.2d at 657; Western Fire Insurance Co. v. Reyna, 495 S.W.2d 57, 59 (Tex. Civ. App.--Corpus Christi 1973, writ ref'd n.r.e.). In view of our disposition of the other points of error and our holding that many of the assets in question are partitionable in certain percentages as a matter of law, and considering that the jury's answers to the remaining Jury Questions are generally favorable to the appellants, we hold that any error in the designation of the parties was harmless. Appellants' thirtieth point of error is overruled.

PRE AND POST JUDGMENT INTEREST

By their sixth and seventh, twenty-fifth through twenty-seventh and thirty-first points of error, appellants complain

that the trial court erred in awarding pre- and post-judgment interest in connection with various partitions and awards.

By their sixth and seventh points of error, specifically, appellants complain that the trial court failed to correctly apportion the prejudgment interest on the Briner note installment payments in view of appellants' separate property interest in the majority of the proceeds, that there is no legal basis for an award of prejudgment interest in a partition suit, and that they have not resisted a partition of the interest due to the Erlandsons.

The Texas Supreme Court recently reiterated in Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985), the present rules regarding the authority of the trial court to award prejudgment interest. The court first acknowledged that there are two forms of prejudgment

interest: 1. Interest as interest--compensation allowed by law or fixed by the parties for the use or detention of money; and 2. Interest as damages--compensation allowed by law as additional damages for the lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment. Id., at 551-52. The Court also recognized that an award of prejudgment interest could be based on general principles of equity, as well as specific statutory authority. Cavnar, 696 S.W.2d at 552; Phillips Petroleum Co. v. Stahl Petroleum Co., 569 S.W.2d 480, 485 (Tex. 1978). Accordingly, the Supreme Court allowed the prevailing party to recover prejudgment interest on personal injury damages that had accrued by the time of judgment the rate established by Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 §2 (Vernon

Supp. 1989). Cavnar, 696 S.W.2d at 554.

In the present case, the amounts distributed to the Erlandsons as their portion of the funds were not awarded as damages but merely as a partition of the jointly owned property. A trial court, however, has the authority to adjust the equities and claims of the parties in connection with the partition of property. Sayers v. Pyland, 161 S.W.2d 769, 771-72 (Tex. 1942); Green v. Doakes, 593 S.W.2d 762, 756 (Tex. Civ. App.--Houston [1st Dist] 1979, no writ); Bouquet v. Belk, 404 S.W.2d 862, 864 (Tex. Civ. App.--Corpus Christi 1966, writ ref'd n.r.e.); see also Gilleland v. Meadows, 351 S.W.2d 656, 658 (Tex. Civ. App.--Dallas 1961, no writ); Winkler v. Craven, 265 S.W.2d 191, 197 (Tex. Civ. App.--Waco 1954, writ ref'd n.r.e.) (Where one joint owner occupies real property to the exclusion of another,

upon partition the trial court may hold him liable for the reasonable rental value of the property).

Since the parties in the present case did not trace the jointly owned installment payments to any distinct and separate account or property which was subject to partition, the trial court could only award to the party out of possession an amount equivalent to the value of their interest in the original funds, plus the interest that those funds could have been expected to earn in the interim. We hold that the principles of equity mentioned in Cavnar and the authority of the trial court to adjust the equities in connection with a partition allow the Erlandsons to recover such prejudgment interest under the terms of Cavnar, as compensation for the expected increase in the value of the original funds over a period of time.

We overrule appellants' sixth and seventh points of error to the extent that they complain trial court had no authority to award prejudgment interest. However, we sustain appellants' sixth point to the extent that the trial court erred in apportioning the underlying funds upon which prejudgment interest was calculated.

By their twenty-fifth and twenty-sixth points of error, appellants complain that the trial court erred in awarding prejudgment interest to appellees on the $257,130.50 initial down payment by Briner on the repurchase of its stock and on the $115,188.98 payment to John W. Nee from the Briner pension and profit sharing plan.

As with the installment payments, the Erlandsons' interests in the down payment and the pension plan were awarded not as damages but as a partition of jointly owned property. Unlike the installment payments,

however, it is clear and uncontested from the bank records introduced at trial that both the down payment and the pension payment were deposited before Lorene Nee's death in the couple's MBank Account No. 641-959-9. Before Lorene's death, either spouse had the authority to make routine expenditures from that account, which are presumed to be for the benefit of the community in the absence of some evidence of a disposition which is unfair to the other spouse. See Krueger v. Williams, 359 S.W.2d 48, 50 (Tex. 1962); Mazique v. Mazique, 742 S.W.2d 805, 807-808 (Tex. App.--Houston [1st Dist] 1987, no writ).

In addition, as we examined in our discussion of points of error four through sixteen, the purchase of series no. 112 MIT bonds for $150,000 April 30, 1984, extinguished any community interest in the MBank account that had survived from the

deposits of the down payment and pension payment in question. These bonds then become subject to partition in the present action. Therefore, although the Erlandsons may claim a denial of their beneficial use of the funds before judgment is rendered, the actual accrual of interest or investment profits on their interest in the subsequently purchased bonds has already been divided as a part of the partition and compensated them for the expected increase in value over time of that interest. Appellants twenty-fifth and twenty-sixth points of error are sustained.

By their twenty-seventh point of error, appellants complain that the trial court had no authority to award prejudgment interest on amounts reimbursed to appellees for half of the payments made during marriage for life insurance premiums on John W. Nee's life. Where community funds

are used to pay the premiums on a policy insuring the life of a spouse and payable to his estate or a third party, the policy and its proceeds are his separate property, but the community estate is entitled to reimbursement. McCurdy v. McCurdy, 372 S.W.2d 381, 383-84 (Tex. Civ. App.--Waco 1963, writ ref'd).

As we stated earlier, prejudgment interest may be awarded under equitable principles as compensation for the use or detention of money. Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 552 (Tex. 1985); Phillips Petroleum Co. v. Stahl Petroleum Co., 569 S.W.2d 480, 485-87 (Tex. 1978); Gulf Construction Co. v. Self, 676 S.W.2d 624, 631 (Tex. App.--Corpus Christi 1984, writ ref'd n.r.e.). For instance, one who advances funds on behalf of another so as to be entitled to reimbursement, is also entitled to

equitable prejudgment interest on the amounts advanced. See Shebay v. Davis, 717 S.W.2d 678, 684 (Tex. App.--El Paso 1986, no writ) (attorney advanced money to finance a class action). Lorene Nee advanced her half of the community funds used to purchase life insurance for John W. Nee's benefit during the term of the marriage, and her estate is entitled to reimbursement, as well as prejudgment interest for the use of these funds. The amounts to be reimbursed, unlike assets which are subject to partition, do not by themselves accrue interest or investment profits, or increase in value over a period of time. The trial court did not err in awarding prejudgment interest on these amounts. Appellants' twenty-seventh point of error is overruled.

By their thirty-first point of error, appellants complain that the trial court

erred in awarding monetary damages and pre- and post-judgment interest thereon in a suit for partition. Appellants argue that various accounts held by the two estates as tenants in common should have been partitioned in kind without monetary awards and interest calculations.

Specifically, appellants complain about portions of the judgment affecting two basic situations which arose with regard to a number of different bank accounts. The judgment partitioned all of the complained of accounts to Lorene's estate as of the date of her death, plus half the earnings, dividends, and distributions on the accounts from that date until payment to her executor, plus pre- and post-judgment interest from the date of Lorene's death until payment to her executor.

With regard to bank accounts in the

first situation,[6] the accounts were themselves available at the time of judgment for partiticning of the amounts originally deposited, as well as the accumulation of earnings, dividends and distributions. As we discussed with regard to the funds in points of error twenty-five and twenty-six, awarding the actual accrual of the profits on these accounts until payment to Lorene's executor has already compensated the Erlandsons for the expected increase in value. Thus, there was no basis for the trial court to adjust the equities in connection with these payments to allow the Erlandsons to recover pre- or post-judgment interest. We sustain

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[6]Merrill Lynch Account no. 532-36829; Merrill Lynch Capital Fund Account; Merrill Lynch Basic Value Fund Account; Dreyfus Leverage Fund, Inc; Keystone Account Series S-4; and MBank Certificates of Deposit no. 31731, no. 31732 and no. 34568.

appellants' thirty-first point of error with regard to these accounts.

With regard to bank accounts in the second situation,[7] however, the judgment recited, and appellants concede, that because the Nees had already expended the funds in these accounts the court would award the value of the accounts at Lorene's death as an offset, plus pre- and post-judgment interest from that date until payment to her executor. Appellants agree that the offset of $19,067.50 is justified, but dispute the award of pre- and post-judgment interest. As with the funds in points of error six and seven, there were no distinct and separate accounts here subject to partition. The trial court properly awarded to the

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[7]MBank Checking Account No. 275-910-5; Citizen's State Bank Certificate of Deposit No. 32476; Citizen's State Bank Savings Account No. 571028600.

Erlandsons an amount equivalent to the value of their interest in the original funds, plus pre- and post-judgment interest as compensation for the expected increase in the value of the original funds over time, under the principles of equity mentioned in Cavnar and the authority of the trial court to adjust the equities in connection with a partition. See Cavnar, 696 S.W.2d at 554; Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 (Vernon Supp. 1989). We overrule appellants' thirty-first point of error with regard to these accounts.

Having disposed of appellants' points of error, we now turn to the eight crosspoints raised by the appellees.

CROSSPOINTS

Appellees complain by crosspoint one that the trial court erred in awarding attorney's fees to appellants. The judgment awarded to each side the reasonable value of their attorney's fees against the other side. As we stated in our discussion of appellants' twenty-fourth point of error, attorney's fees are not recoverable the present partition action. See Green, 593 S.W.2d at 765. The trial court should not have awarded attorney's fees to either party. Appellees' first crosspoint is sustained.

Appellees complain by crosspoints two and three that the trial court erred in failing to disqualify appellants' trial attorney

("counsel"). Appellees argue both that counsel had a conflict of interest which prejudiced their rights to a fair trial in

general, and that counsel's role as attorney exempted him from testifying and prevented appellees from fully developing and presenting evidence concerning an alleged conspiracy between counsel and the appellants.

As one ground for disqualification, appellees allege a conflict of interest between counsel and the various appellants. In the past, counsel had prepared on behalf of several of the appellants many of the documents being litigated, including the Briner buy-sell agreement and the promissory note on the 2,200 shares of stock, the power of attorney executed by John W. Nee appointing Michael Nee, and both of John W. Nee's wills. At trial, counsel represented John W. Nee, the John W. Nee heirs, the Bank as administrator of John W. Nee's estate, and Briner. However, it would seem to be a prerequisite to

complain of a conflict of interest that the attorney stands in some relation of confidence or trust to the party complaining. See Mallou v. Payne & Vendig, 750 S.W.2d 251, 258 (Tex. Civ. App.--Dallas 1988, writ denied). In the present case, the alleged conflict could have prejudiced only the rights of the appellants. We fail to see, and appellees have failed to show us, how any such conflict could have prejudiced their rights in the presentation of their case.

Appellees primarily complain, however, that counsel's role as attorney for the Nees prejudiced the Erlandsons in their examination of him as a witness. Appellees alleged in their petition that the Nees entered into a conspiracy counsel wrongfully to convert to their own use property claimed by Lorene Nee's estate, and they made a pretrial motion to

disqualify counsel from further representation of the appellants. The trial court, however, denied their motion and counsel continued as appellants' attorney throughout the trial.

The mere announcement by an adversary that he intends to call opposing counsel as a witness is insufficient to require counsel's disqualification. United Pacific Insurance Co. v. Zardenetta, 661 S.W.2d 244, 248 (Tex. Civ. App.--San Antonio 1983) (original proceeding). The Courts recognize a clear danger that motions to disqualify may be used solely as a convenient means of eliminating a skillful or otherwise unwanted adversary and causing hardship his client. Bert Wheeler's, Inc. v. Ruffino, 666 S.W.2d 510, 514 (Tex. App.--Houston [1st Dist.] 1983) (original proceeding). In order to establish a right to have opposing counsel disqualified, the

movant has the burden to show that he is not seeking disqualification as a purely tactical maneuver, but that he has a genuine need for counsel's testimony, which is material to the movant's case as well as prejudicial to the interests of the counsel's client. Gilbert McClure Enterprises v. Burnett, 735 S.W.2d 309, 311 (Tex. Civ. App.--Dallas 1987) (original proceeding); Zardenetta, 661 S.W.2d at 248.

The trial court should be given wide discretion in making this determination, which depends largely on the circumstances of each case. See Ruffino, 666 S.W.2d at 514. In the present case, the trial court could reasonably conclude that appellees' conclusory allegations of conspiracy between counsel and the Nees was immaterial to any of the primary issues in the underlying partition action, and merely a tactical maneuver designed to cause

hardship to the Nees and eliminate an adversary with extensive prior knowledge of the matters at issue. Appellees second and third crosspoints are overruled.

Appellees complain by crosspoint four that the jury's answers to Jury Questions 3, 5, 6, and 7 are against the great weight and preponderance of the evidence that the enhanced value of the 2,000 shares of Briner stock was the difference between the reasonable compensation to be paid John W. Nee and the compensation and benefits which he actually received.

However, we find that the evidence was sufficient to support the jury's findings that John W. Nee already received reasonable compensation for his efforts in the form of salary and other benefits. Scott Turner, a Certified Public Accountant hired by appellants to investigate the compensation scheme at Briner, testified to

the amount and reasonableness of John W. Nee's compensation at Briner. His analysis suggested that John W. Nee's salary and other direct compensation at Briner was comparable to compensation generally paid to chemists and engineers of his caliber. Paul Laudadio, now the president of Briner, also testified that the officers', including Nee's, salaries and compensation were in line with their positions. Even Erlandson's expert, Robert Tollen, who did a relative comparison of Laudadio's and Nee's compensation over the years, testified that he was not telling the jury that Nee was not "well-paid" for his services to Briner. Appellee's fourth crosspoint is overruled.

Appellees complain by their fifth crosspoint that the trial court erred in failing to require the jury's percentage findings to total 100% in answer to Jury

Question 3, which inquired about the percentage John W. Nee's efforts preserved or increased the value of his stock. However, the jury's findings of reasonable compensation make this finding irrelevant, and any error in the submission is harmless. Appellees' fifth crosspoint is overruled.

Appellees complain by their sixth, seventh and eighth crosspoints that the evidence shows conclusively, as well as by the great weight and preponderance, that Michael or Linda Nee converted various community accounts and funds, and the stamp and coin collections belonging to the community estate. The jury, however, refused to find such a conversion in response to Jury Question 15.

The evidence shows that Michael and Linda Nee lived at their father's house at 714 St. Pius for a period of time from

shortly after Lorene Nee's death in 1984 until shortly after John W. Nee died on October 20, 1986. Their stated purpose for living with their father was to take care of his needs and to maintain the household. When Michael and Linda felt that they could no longer provide for their father's needs, they put him in a nursing home in March of 1985, but they continued to live at the residence and to maintain the household out of community funds. Michael Nee testified that he had his father's permission to "be in charge of his affairs and handle things throughout." Michael, therefore, derived his authority to control and dispose of community assets through his father's authority as surviving spouse. He drew from community funds then held by his father what he termed a "salary" totaling approximately $36,000 over the period of Michael's residence there. Other

expenditures from community funds include $500 a month for Linda's living expenses, $1,500 a month for the expense of keeping their father in the nursing home, and roughly $80,000 in attorney's fees, as well as numerous other household expenditures. Total expenses alleged against the Nees for this period were $358,502. In addition, when Michael and Linda moved out in December of 1986, Michael took with him the stamp and coin collections.

Conversion is the wrongful exercise of dominion and control over another's property in denial of or inconsistent with his rights. Waisath v. Lack's Stores, Inc., 474 S.W.2d 444, 446 (Tex. 1971); Virgil T. Walker Construction Co. v. Flores, 710 S.W.2d 159, 160 (Tex. Civ. App.--Corpus Christi 1986, no writ). A suit for conversion may be maintained by one tenant in common against another tenant

in common who appropriates to his own use and benefit the entire property owned in common between them. 307 S.W.2d 331, 315 (Tex. Civ. App.--Texarkana 1957, no writ); Friemel v. Crouch, 189 S.W.2d 764, 766 (Tex. Civ. App.--Amarillo 1945, writ ref'd w.o.m.). Under Tex. Prob. Code Ann. § 168 (Vernon - 1980), the surviving spouse is required upon final partition of the estate of his deceased spouse to deliver to the heirs their interest in the community estate. If the survivor improperly disposes of the community estate, the heirs of the deceased spouse, as tenants in common with the surviving spouse, have a right to treat his actions as a conversion to the extent that the property remaining is insufficient to satisfy their interest in the community estate. See Gaines v. Lee, 175 S.W.2d 728, 730-31 (Tex. Civ. App.--Waco 1943, writ ref'd w.o.m.);

McFarland v. Beaton, 126 S.W.2d 719, 726 (Tex. Civ. App.--Dallas 1939), aff'd, 134 S.W.2d 1058 (Tex. 1940).

The present partition already divides the accounts in question, or equivalent amounts in cash, between the estates, as well as the stamp and coin collections, which were ordered to be delivered to John W. Nee's executor and divided in kind. Only if a partition of the assets presently available from the community estate could not adequately compensate the Erlandsons for their interest in the estate would a further action for conversion be appropriate. We overrule appellees' sixth, seventh and eighth crosspoints.

Based on disposition of the various points and crosspoints, we reverse those portions of the trial court's judgment that are inconsistent with this opinion. It is ordinarily the duty of the appellate court

to render such judgment as the trial court should have entered. Since the errors in the present case involve amounts that may be certainly calculated, but the tracing of which is complicated and involved detailed mathematical calculations, we remand this case to the trial court for determination of the interests of the parties and with instructions to partition the various assets in question in accordance with this opinion. See Strata Energy, Inc. v. Gavenda, 753 S.W.2d 789, 792 (Tex. App.--Houston [14th Dist.] 1988, no writ).

NORMAN L. UTTER

Justice

Justice J. Bonner Dorsey not participating.

Opinion ordered not published.
Tex. R. App. P. 90
Opinion delivered and filed this
the 1st day of February, 1990.

PERTINENT QUOTATION OF SPECIFIC PORTIONS OF THE RECORD OR SUMMARY THEREOF WITH SPECIFIC REFERENCES TO THE RECORD WHERE THEY APPEAR:

2. "Appellees' Motion for Reconsideration en banc; Appellees' Motion for Resubmission and Reargument; and Appellees' Motion for Rehearing" to the Texas 13th Court of Appeals, Cause No. 13-88-523-CV, in International Bank of Corpus Christi et al. v. Paul J. Erlandson, et al. (page ii).

"Because of Justice Dorsey's recusal and Justice Utter's death, the Appellees are deprived of the benefit of both the trial and appellate process, and their constitutional rights to an appeal. Justice is not served by one appellate justice effectively and completely overruling the findings of the six jurors who heard the evidence of this case over

a nine week period of time, and then, not fully remanding but effectively rendering the case to the judge of the trial court to enter a judgment after the appellate court has wrongfully disregarded all of the jury findings for or against either party."

3. "Appellees' Motion for Reconsideration en banc; Appellees' Motion for Resubmission and Reargument; and Appellees' Motion for Rehearing" to the Texas 13th Court of Appeals, Cause No. 13-88-523-CV, in International Bank of Corpus Christi et al. v. Paul J. Erlandson, et al. (pages vii-viii, 2-7).

"1. The Court of Appeals erred in this case of first impression by reversing the judgment and completely disregarding the Appellees' favorable jury findings that Appellees are entitled to one-half of proceeds from the sale of Briner stock under a theory of deferred compensation; and, wholly ignoring Appellants negative jury findings on tracing; and misstates, misapplies, and skews uncontroverted evidence in its

recitation of the facts which support Appellees right to recovery on issue number 4; and, wrongfully decides the monetary proceeds from the sale of the 2,000 shares of Briner stock during the marriage was separate as a matter of law, thus substituting its opinion for that of the jury that the proceeds were community, in direct violation of Pool v. Ford Motor Company, and Herbert v. Herbert, when the evidence clearly supports the jury findings of deferred compensation.

2. The Court of Appeals erred by failing to recognize that Appellees submitted the case to the jury under two separate and distinct theories of recovery:

(a) the proceeds for the sale of the 2,000 shares of Briner stock during the marriage, were

deferred compensation (question 4);

(b) alternatively, the community is entitled to reimbursement under an enhancement theory (question 3, 5, 6, and 7) as pronounced in Jensen v. Jensen and Trawick v. Trawick;

(c) and then the Court of Appeals improperly intermixes the two theories of recovery (Jensen and Trawick, and deferred compensation) to wrongfully hold that Appellees are denied their jury findings on deferred compensation as a matter of law.

(d) The Court of Appeals failed to recognize that the Appellees are entitled to their recovery under the deferred compensation

theory presented in question 4, and mandated in Texas Rule of Civil Procedure 301, because it gives the Appellee the greatest recovery, and entitles the Lorene E. Nee estate to one-half (1/2) of the sale proceeds from the 2,000 shares of Briner stock payable under the promissory note executed during marriage, because of the jury's findings that the monies were deferred compensation.

(e) The Court of Appeals erred in its misapplication of the percentage issue found by the jury in issue number 3 which has application to the reimbursement theory and not to deferred compensation.

(f) In the alternative, the Lorene

E. Nee Estate is entitled to recover one-half of 17/20ths of the $935,020.00 plus one-half of the interest due under the Briner promissory note.

8. The Court of Appeals erred by wrongfully classifying the litigation as a partition action, and failing to recognize that property to be distributed must first be characterized as community or separate under the Declaratory Judgment Act before it can be partitioned between two estates; where the two estates were being probated in two separate county courts at law sitting in probate, and where motions to consolidate to have one probate court hear the matter, were denied.

(a) The Court of Appeals erred in holding that the Trial Court abused its discretion in

allowing the Appellees to proceed as Plaintiffs in their Declaratory Judgment action.

(b) The Court of Appeals erred because this case is not a partition suit by John W. Nee or Lorene E. Nee's estate because the first suit brought by John W. Nee was for removal of the executor of the Estate of Lorene E. Nee and was not a proper partition suit but only mentioned the word "partition" one time in the pleading and never pled nor sought relief for partition, and failed to post bond as required by Texas Probate Code Sec. 385, under the erroneous partition theory embraced by the Court of Appeals.

10. The Court of Appeals erred in ignoring the community presumption and adopting as a matter of law the erroneous attempt by Appellants of tracing which was based on the erroneous and fallacious 200/2200 percentage, and then misapplies the erroneous formula:

(a) The percentage erroneously assumes the monies from the sale of 2,000 Briner shares is John Nee's separate property where the jury found the monies were deferred compensation, and thus community;

(b) The percentage is erroneously applied to both principal and interest of the $1,028,522.00 Briner promissory note where the $144,236.30 interest therein is community;

(c) The percentage erroneously

assumes because Lorene died after the Briner $257,135.00 down payment and before the $183,125.56 five annual installments were paid, that the five annual payments are John Nee's separate property, though the payments include vested community interest at six percent.

(d) The jury finding to question 1 that the 2,000 Briner shares were initially acquired three years prior to John and Lorene's 17 year marriage was not submitted under the clear and convincing test required by tracing but was submitted under Appellees reimbursement theory on a preponderance of the evidence test; and therefore

will not support a finding that the monies from the sale of the Briner shares were separate as a matter of law.

(e) The interest and monies under the Briner promissory note executed and partially satisfied before Lorene E. Nee's death and the remainder paid after Lorene E. Nee's death, were erroneously held as a matter of law to be John W. Nee's separate property.

11. The Court of Appeals erred in holding that Appellants traced separate property as a matter of law because Appellants failed to trace and identify monies claimed to be separate by clear and convincing evidence; failed to submit substantially correct questions; and, failed to obtain favorable jury findings

under questions 24, 25, 26, 27, 28, 29, and 30; failed to trace the subsequent five $183,125.56 Briner installment payments under the Briner promissory note, as the separate property of John W. Nee as a matter of law; and completely disregards the negative jury findings that John W. Nee failed to trace monies to separate property of John W. Nee and substitutes its opinion for that of the jury in direct violation of Pool v. Ford Motor Company, and Herbert v. Herbert.

12. The Court of Appeals erred in reversing the judgment because it substitutes its judgment for that of the jury in direct contravention of Pool v. Ford Motor Company by disregarding the jury findings in issues 9, 10, 11, and 12, based on clear and convincing evidence that the monies in the Army-Navy Federal Credit Union and Merrill-Lynch

were separate property of Lorene E. Nee, and holding that the summary and testimony of Paul J. Erlandson was insufficient to support the jury findings that the monies in the Army-Navy Federal Credit Union and Merrill-Lynch were the separate property of Lorene E. Nee, when all the documents evidencing the transactions over the years were admitted into evidence as exhibits 159, 160, 161, and 162.

24. The present policy adopted by the Texas Supreme Court under V.T.C.A. Government Code Sec. 22.001 and Texas Rule of Appellate Procedure 133, after the filing of this case, that when the Supreme Court is not satisfied with the opinion of the Court of Appeals, its policy to ignore clear and abusive error in Courts of Appeals if the Supreme Court is of the opinion that the application

presents no error of law requiring reversal or which is not of great enough importance to the jurisprudence of the state of Texas to require correction, denies Appellees their jury findings and fair access to the judicial process and is therefore unconstitutional."

4. "Petitioner's Application for Writ of Error filed in the Texas Supreme Court", Cause No. C-9808, Paul J. Erlandson et al. v. International Bank of Corpus Christi, et al., pages (ii, xi-xiv, xv)

"STATEMENT OF JURISDICTION: This Court has jurisdiction to hear the matter under 22.001 (a) (6) of the Government Code, because the issues in this case on deferred compensation and partition present matters of first impression in the State of Texas, and because the Court of Appeals decision is unconstitutional under the Gov't Code, Sec. 22.222, Texas Constitution, Art. V, Sec. 6, and under this Court's opinions in Hayden v. Liberty Mutual Fire Ins. Co., 786 S.W.2d 260 (Tex. 1990) and MAPCO v. Ninth Court of Appeals, 786 S.W.2d 368 (Tex. 1990) where Justice Dorset withdrew and Justice

Utter died."

"1. The Court of Appeals erred in reversing and rendering the trial court judgment and disregarding the jury issues found in favor of the Petitioners, and holding that the Respondents prevailed as a matter of law with fewer than three justices on the panel, required by Tex. Gov't Code Ann. Sec. 22.222 (Vernon 1988), and Tex. Const. art. V, Sec. 6. and the Supreme Court dictate in Hayden v. Liberty Mutual Fire Insurance Company, 33 Tex. S. Ct. J. 280 (February 28, 1990); and MAPCO v. Ninth Court of Appeals, 33 Tex. S. Ct. J. 303 (March 7, 1990), where Justice Dorsey recused himself after argument and submission but did not participate in the opinion, and Justice Utter died after the opinion but before the Motion for Rehearing was filed. (Germane to Petitioners Motion for

Rehearing, Motion for Reconsideration, and Motion for Reargument, and Resubmission En Banc and point number 24 on Motion for Rehearing, Judgment of Court of Appeals.

2. Texas Rule of Appellate Procedure 79 is unconstitutional because it is in contravention to V.T.C.A., Government Code, Sec. 22.222 and Tex. Const. art. V, Sec. 6. (Germane to Petitioners Motion for Rehearing, Motion for Reconsideration, and Motion for Reargument, and Resubmission En Banc and Point of error numbers 24 on Motion for Rehearing, and Judgment of Court of Appeals).

3. The present policy of the Texas Supreme Court of limited appeals is unconstitutional under V.T.C.A. Government Code Sec. 22.001 and Texas Rule of Appellate Procedure 133, because

it is improper to ignore clear and abusive error in Courts of Appeals, or determine a matter is not of significant importance to the jurisprudence of the state of Texas to require correction, which would deny Petitioners their jury findings, fair access to the judicial process, allows unlimited discretion, and it is an abuse of power not to correct clear error in Court of Appeals decisions. (Germane to Petitioners Motion for Rehearing, Motion for Reconsideration, and Motion for Reargument, and Resubmission En Banc and Point of error numbers 24 on Motion for Rehearing).

4. The Court of Appeals erred by failing to recognize that Petitioners submitted the case to the jury under two separate and distinct theories of recovery--reimbursement under Jensen v.

Jensen, and Trawick v. Trawick; and deferred compensation, entitling Petitioners to recover one-half the proceeds solely under the theory of deferred compensation found by the jury:

(a) The $1,028,522.00 proceeds from the sale of the 2,000 shares of Briner stock during the marriage, were deferred compensation (issue 4).

(b) The Court of Appeals improperly intermixes the two theories of recovery (reimbursement under Jensen and Trawick, and deferred compensation) to wrongfully deny Petitioners their jury findings on deferred compensation as a matter of law.

(c) The Court of Appeals failed to recognize that the Petitioners

are entitled to their recovery solely under the deferred compensation theory presented in issue 4, and mandated in Texas Rule of Civil Procedure 301, because it gives the Petitioners the greatest recovery, and entitles the Lorene E. Nee estate to one-half (1/2) of the $1,028,522.00 sale proceeds from the 2,000 shares of Briner stock payable under the promissory note executed during marriage.

(d) The Court of Appeals erred in its application of the 60/10 erroneous percentage issue found by the jury in issue number 3 which had no application to the deferred compensation theory of recovery

but solely to the reimbursement theory of recovery.

(e) In the alternative, the Lorene E. Nee Estate is entitled to recover one-half of 17/20ths of the $935,020.00 plus one-half of the interest due under the Briner promissory note, because she was married to John Nee 17 years of the 20 years the Briner shares were issued in his name.

(f) Alternatively, the community is entitled to reimbursement under an enhancement theory (issue 3, 5, 6, and 7) as pronounced in Jensen v. Jensen and Trawick v. Trawick.

(Germane to points of error 2 on Motion for Rehearing, Appendix "B" to this brief; Court of Appeals

Opinion p. 8-11; p. 45-46).

5. The Court of Appeals erred in ignoring the community presumption and adopting as a matter of law the Respondents tracing, which was based on the erroneous and fallacious 200/2200 percentage.

(a) The 200/2200 percentage erroneously assumes the monies from the sale of 2,000 Briner shares is John Nee's separate property where the jury found the monies were deferred compensation, and thus community;

(b) The 200/2200 percentage is erroneously applied to both principal and interest of the $1,028,522.00 Briner promissory note where the $144,236.30 interest therein is

unquestionably community;

(c) The 200/2200 percentage erroneously assumes because Lorene died after the Briner $257,135.00 down payment and before the $183,125.56 five annual installments were paid, that the five annual payments are John Nee's separate property, though the payments include vested community interest at six percent.

(d) The jury finding to question 1 that the 2,000 Briner shares were initially acquired three years prior to John and Lorene's 17 year marriage was not submitted under the clear and convincing test required by tracing, but was submitted under Petitioners reimbursement

theory on a preponderance of the evidence test; and therefore, will not support a finding that the monies from the sale of the Briner shares were separate as a matter of law.

(Germane to points of error 10 on Petitioners Motion for Motion for Rehearing; Appendix "B" to this brief; Court of Appeals Opinion p. 11-19 and p. 46).

6. The Court of Appeals erred in holding that Respondents traced separate property as a matter of law because Respondents failed to trace and identify monies claimed to be separate by clear and convincing evidence; failed to submit substantially correct questions; and, failed to obtain favorable jury findings

under questions 24, 25, 26, 27, 28, 29, and 30; failed to trace the subsequent five $183,125.56 Briner installment payments under the Briner promissory note, as the separate property of John W. Nee as a matter of law; and completely disregards the negative jury findings that John W. Nee failed to trace monies to separate property of John W. Nee, and the Court of Appeals substitutes its opinion for that of the jury in direct violation of Pool v. Ford Motor Company, and Herbert v. Herbert. (Germane to points of error 11 in Petitioners Motion for Rehearing; Appendix "B", Court of Appeals Opinion p. 46, 11-19).

7. The Court of Appeals erred in this case of first impression on deferred compensation, by reversing the judgment and completely disregarding the Petitioners' favorable jury findings,

then substituting its opinion that the proceeds were separate property as a matter of law, for that of the jury in issue 4 which found the proceeds were community; in direct violation of Pool v. Ford Motor Company, and Herbert v. Herbert, where the evidence clearly supports the jury findings of deferred compensation. (Germane to Petitioners Motion for Rehearing, points of error 1 on Motion for Rehearing, TR Vol. III, p. 432, Question 4, Appendix "B" to this brief, Court of Appeals Opinion p. 8-11 and 11-19).

8. The Court of Appeals erred in reversing the judgment because it substitutes its judgment for that of the jury in direct contravention of Pool v. Ford Motor Company by disregarding the jury findings in issues 9, 10, 11, and 12, based on clear and convincing

evidence that the monies in the Army-Navy Federal Credit Union and Merrill-Lynch were separate property of Lorene E. Nee, and holding that the summary and testimony of Paul J. Erlandson was insufficient to support the jury findings that the monies in the Army-Navy Federal Credit Union and Merrill-Lynch were the separate property of Lorene E. Nee, when all the documents evidencing the transactions omitted in the summary over the years were admitted into evidence as exhibits 159, 160, 161, and 162, to support the summary, without objection. (Germane to points of error 12 in Petitioners Motion for Rehearing; Court of Appeals Opinion p. 24-27).

17. The Court of Appeals erred by wrongfully classifying the litigation as a partition action, and failing to recognize that property to be distributed

must first be characterized as community or separate under the Declaratory Judgment Act before it can be partitioned between two estates; where the two estates were being probated in two separate county courts at law sitting in probate, and where motions to consolidate to have one probate court hear the matter, were denied.

(a) The Court of Appeals erred in holding that the Trial Court abused its discretion in allowing the Petitioners to proceed as Plaintiffs in their Declaratory Judgment action.

(b) The Court of Appeals erred in holding that John Nee's "partition" action was filed before Petitioners Declaratory Judgment action, because the first suit brought by John W.

Nee was for removal of the executor of the Estate of Lorene E. Nee and was not a proper partition suit but only mentioned the word "partition" one time in the initial pleading.

(Germane to points of error 8, in Petitioners Motion for Rehearing; Court of Appeals Opinion p. 33-36)."

5. Petitioners' Motion for Rehearing in the Texas Supreme Court in Cause No. C-9808, Paul J. Erlandson et al. v. International Bank of Corpus Christi.

"The Court of Appeals erred as follows and Petitioners Motion for Rehearing should be granted:

1. THE COURT OF APPEALS IGNORES THE "DEFERRED COMPENSATION" THEORY OF RECOVERY RAISED BY THE LORENE E. NEE ESTATE AND ERRONEOUSLY TREATS THIS CASE AS IF IT WERE A "REIMBURSEMENT CASE" UNDER JENSEN V. JENSEN, 715 S.W.2d 629 (Tex. 1986).

2. THE LORENE E. NEE ESTATE HAS BEEN DENIED PROPERTY WITHOUT DUE PROCESS OF LAW, DENIED ITS RIGHT TO A JURY TRIAL, AND PROPER APPEAL UNDER THE UNITED STATES AND TEXAS CONSTITUTIONS.

3. THE LORENE E. NEE ESTATE WAS

DENIED EQUAL PROTECTION OF THE LAWS UNDER THE UNITED STATES AND TEXAS CONSTITUTIONS.

4. THE COURT OF APPEALS WRONGFULLY HELD AS A MATTER OF LAW THAT THERE WAS "NO EVIDENCE" TO SUPPORT THE FAVORABLE JURY FINDINGS THAT $71,977.00 WAS LORENE E. NEE ESTATE'S SEPARATE PROPERTY.

5. THE COURT OF APPEALS FAILED TO PROPERLY SUMMARIZE THE FACTS AS REQUIRED BY POOL V. FORD MOTOR COMPANY, 715 S.W.2d 629, (Tex. 1986).

6. THE COURT OF APPEALS WRONGFULLY DISREGARDED ALL THE JURY FINDINGS AND REVERSED THE JUDGMENT AS A MATTER OF LAW WITH ONLY TWO THEN ONE JUSTICE ON THE COURT OF APPEALS PANEL, REQUIRING THIS COURT TO REMAND THE CASE BACK TO THE COURT OF APPEALS FOR RECONSIDERATION.

I. DEFERRED COMPENSATION

1. THE COURT OF APPEALS IGNORES THE

"DEFERRED COMPENSATION" THEORY OF RECOVERY RAISED BY THE LORENE E. NEE ESTATE AND ERRONEOUSLY TREATS THIS CASE AS IF IT WERE A "REIMBURSEMENT CASE" UNDER JENSEN V. JENSEN, 715 S.W.2d 629 (Tex. 1986).

2. THE LORENE E. NEE ESTATE HAS BEEN DENIED PROPERTY WITHOUT DUE PROCESS OF LAW, DENIED ITS RIGHT TO A JURY TRIAL, AND PROPER APPEAL UNDER THE UNITED STATES AND TEXAS CONSTITUTIONS.

3. THE LORENE E. NEE ESTATE WAS DENIED EQUAL PROTECTION OF THE LAWS UNDER THE UNITED STATES AND TEXAS CONSTITUTIONS.

This court, for the first time in Texas, is called upon to decide whether deferred compensation should be treated as separate or community property when there are conflicting claims by the

spouses' estates. The law is clear in traditional retirement plans, that the community shall share pro rata with the separate interest. If deferred compensation is community property or is to be treated like retirement programs, then the opinion of the improperly constituted Thirteenth Court of Appeals wrongfully deprives the Lorene E. Nee Estate, and her heirs, property without due process, without equal protection of the law, denies them substantive and procedural due process, and denies the Lorene E. Nee Estate and the Lorene E. Nee heirs the right to a jury and a proper appeal.

John W. and Lorene E. Nee were married 17 of the 20 years in which John W. and Lorene E. Nee owned 2,200 shares of stock in a closely held corporation called Briner Paint Mfg. Co. Inc. Two

hundred (200) of the shares were undisputed community property. The John Nee Estate claimed a separate interest in 2,000 of the shares. John W. Nee was the majority shareholder and principal of the company. Briner Paint Mfg. Co. Inc. required its key employees and principals to resell the Briner stock back to Briner Paint upon retirement or death. The stock value on resale to Briner Paint was a retirement plan based on tax considerations, which allowed the principals to be taxed at lower capital gains rates rather than higher ordinary income tax rates. During the 17 of the 20 years in which John W. Nee and Lorene E. Nee were married, the stock increased in value from $25.00 per share to $467.51 per share. The increase was attributed to John deferring his compensation back into Briner Paint over John and Lorene's 17

year marriage. This case presents to this Court for the first time, how "deferred compensation" plans should be treated in Texas, a community property state, where John W. Nee's Estate claims the stock proceeds are separate and Lorene E. Nee's Estate the proceeds are community. Had these parties lived, there would be no dispute. Had they been divorced, the proceeds would have been divided in accordance with Berry v. Berry, 647 S.W.2d 945 (Tex. 1983). Only because of Lorene E. Nee's death and John W. Nee's disability and death, was the issue drawn for the Texas courts and jury system to decide.

The jury found the monies paid for the resale of the stock to Briner Paint were "deferred compensation." The Thirteenth Court of Appeals totally ignored all the jury findings, and

improperly held as a matter of law that the proceeds from the resale of the 2,000 Briner shares belonged to John W. Nee's Estate as his separate property. The Thirteenth Court of Appeals never addressed the "deferred compensation" theory of recovery by the Lorene E. Nee Estate, and now has denied the Lorene E. Nee estate her community share of the property. If the proceeds are "deferred compensation", then the entire amount of $1,172,762.80 is community property entitling the Lorene E. Nee Estate to receive $586,381.40 [1/2 of $1,172,762.80]. If the proceeds are treated as a retirement plan, the Lorene E. Nee Estate would be entitled to receive $498,424.19, [1/2 of 17/20ths of the $1,172,762.80] under established Texas law because they were married 17 of the 20 years the stock was held. Under

the Thirteenth Court of Appeals erroneous opinion, the Lorene E. Nee Estate will receive only $53,307.40 [1/2 of 200/2200 of $1,172,762.80], which is approximately one-tenth of what her Estate is entitled to receive under established Texas law, all because the Thirteenth Court of Appeals wholly disregards the jury's findings and the law and creates a fallacious 200/2200 formula not recognized in Texas law. Allowing such a result, denies spouses in a marital dissolution, whether by death or divorce, their property and will allow spouses with control of small closely held corporations to create plans which circumvent Texas community property law.

II. LORENE E. NEE ESTATE'S SEPARATE PROPERTY

4. THE COURT OF APPEALS WRONGFULLY HELD AS A MATTER OF LAW THAT THERE WAS

"NO EVIDENCE" TO SUPPORT PETITIONERS' FAVORABLE JURY FINDINGS THAT $71,977.00 WAS LORENE E. NEE ESTATE'S SEPARATE PROPERTY.

5. THE COURT OF APPEALS FAILED TO PROPERLY SUMMARIZE THE FACTS AS REQUIRED BY POOL V. FORD MOTOR COMPANY, 715 S.W.2d 629, (Tex. 1986).

The jury found that $71,977.00 held in two accounts was the Lorene E. Nee Estate's separate property from her first marriage over 17 years earlier. The Thirteenth Court of Appeals completely ignored the jury's findings, skewed the evidence, and erroneously held that the property was community as a matter of law. The Court of Appeals disregarded Petitioners favorable jury findings that the $71,977.00 was Lorene E. Nee's separate property and held the $71,977.00

was community property; and ignored John W. Nee's Estate's negative jury findings and held that John W. Nee's property was separate as a matter of law. The evidence supported the jury's findings under the clear and convincing test that the $71,977.00 was Lorene E. Nee's separate property. Skinner v. Skinner, 202 S.W.2d 318 (Tex.Civ.App.--San Antonio, 1947, no writ).

III. PETITIONERS DENIED A JURY AND AN APPEAL BY AN IMPROPERLY CONSTITUTED COURT OF APPEALS

6. THE COURT OF APPEALS WRONGFULLY DISREGARDED ALL THE JURY FINDINGS AND REVERSED THE JUDGMENT AS A MATTER OF LAW WITH ONLY TWO THEN ONE JUSTICE ON THE COURT OF APPEALS PANEL, REQUIRING THIS COURT TO REMAND THE CASE BACK TO THE COURT OF APPEALS FOR RECONSIDERATION.

After oral argument, Justice Dorsey recused himself. After the opinion and before Motion for Rehearing in the Court of Appeals was due, Justice Utter died. Petitioners moved for an en banc hearing before the entire Thirteenth Court of Appeals, which was denied; and Justice Kennedy, the sole remaining justice on the panel denied the Motion for Rehearing. By denying writ, this Court has allowed two, then one justice in the improperly constituted Thirteenth Court of Appeals panel to completely obliterate jury findings, after seven weeks of trial, nullify a trial court judgment, deny Petitioners their jury trial and now a just appeal.

All the above was done virtually simultaneously with this court's holdings in Hayden v. Liberty Mutual Fire Insurance Company, 786 S.W.2d 260 (Tex.

1990) and MAPCO v. Ninth Court of Appeals, 786 S.W.2d 368 (Tex. 1990). By denying writ, this Court allows the Thirteenth Court of Appeals to clearly and openly abuse its power, which nullifies the appellate and judicial process and contravenes Texas law and the United States and Texas Constitution. See Vernon's Gov't Code Ann. Sec. 22.222, and Tex. Const. art. V, sec. 6, Fifth and Seventh Amendment of the United States Constitution, and Art. IV of the United States Constitution.

The Thirteenth Court of Appeals failed completely to address the issues before it, and ad hoc overturned a jury verdict by substituting its opinion for that of the jury, a clear abuse of its power and discretion, and in direct contravention of Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). All

done with first two and finally one justice! Denying writ where there is clear abuse, gives license to all the Courts of Appeals that jury verdicts can be ignored if the Court of Appeals doesn't like the result; and, with tortured, intellectually dishonest logic, can step into the star chamber to write an untoward result. Herbert v. Herbert, 754 S.W.2d 141 (Tex. 1988)."

Any order on rehearing, including the caption showing the name of issuing court, the title and number of the case, and the date of entry.

6. "Overruling of Motion for Rehearing in Texas 13th Court of Appeals", Cause No. 13-88-523-CV, International Bank of Corpus Christi - v. Paul J. Erlandson, et al. on February 27, 1990.

CHIEF JUSTICE PAUL W. NYE

COURT OF APPEALS

CLERK BETH A. GRAY

Thirteenth Supreme Judicial District

JUSTICES
NORMAN L. UTTER
NOAH KENNEDY
ROBERT J. SEERDEN
FORTUNATO P. BENAVIDES
J. BONNER DORSEY

TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

DEPUTY CLERK
CATHY WILBORN

March 8, 1990

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709 South Tancahua
Corpus Christi, TX 78401

RE: CASE NO. 13-88-00523-CV
TRIAL COURT CASE NO. 26372-1A

STYLE: The International Bank of Corpus Christi, Administrator of t V: Erlandson, Paul James, Executor of the Estate of Lorene E. N

The appellees' motion for reconsideration en banc and motion for resubmission and reargument were DENIED by this Court on this date. The appellees' motion for rehearing was OVERRULED by this Court on this date.

The appellants' motion for extension of time to file motion for rehearing was GRANTED by this Court on this date. The appellants' motion for rehearing has been ordered filed as of February 27, 1990. The appellants' motion for rehearing was OVERRULED by this Court on this date.

Respectfully yours,

Beth A. Gray, Clerk

By /s/ Cathy Wilborn
Deputy

7. "Denial of Application for Writ of Error in Texas Supreme Court" in cause no. C-9808, Paul J. Erlandson et al. v. International Bank of Corpus Christi, et al., on November 14, 1990.

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

November 14, 1990

Mr. William H. Berry, Jr.
Ms. Gail D. Dorn
P.O. Box 23064
Corpus Christi, TX 78403

Mr. Charles R. Cunningham
503 Wilson Tower
Corpus Christi, TX 78476

RE: Case No. C-9808
Style: PAUL J. ERLANDSON, INDIVIDUAL AND INDEPENDENT EXECUTOR OF v. THE INTERNATIONAL BANK OF CORPUS CHRISTI, ADMINISTRATOR OF

Dear Counsel:

Both applications for writ of error in the above referenced case were this day denied with the notation, Writ Denied.

Sincerely,

John T. Adams, Clerk

by _____
Blanca Morin, Deputy

8. "Overruling of Motion for Rehearing in Texas Supreme Court" in cause no. C-9808, Paul J. Erlandson et al. v. International Bank of Corpus Christi et al. on January 9, 1991.

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

January 9, 1991

Mr. William H. Berry, Jr.
Ms. Gail D. Dorn
P.O. Box 23064
Corpus Christi, TX 78403

Mr. Charles R. Cunningham
503 Wilson Tower
Corpus Christi, TX 78476

RE: Case No. C-9808

Style: PAUL J. ERLANDSON, INDIVIDUAL AND INDEPENDENT EXECUTOR OF v. THE INTERNATIONAL BANK OF CORPUS CHRISTI, ADMINISTRATOR OF

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled

case.

Sincerely,

JOHN T. ADAMS, Clerk

by_____
Courtland Crocker, Deputy

Judgment sought to be reviewed if the date of entry is different from the date of the opinion or order required in (i)

9. Germane Jury Findings in the Charge of the Court to the issues raised in Application for Writ of Certiorari, in Paul J. Erlandson et al. v. International Bank of Corpus Christi, et al., cause no. 26372-1, County Court at Law No. 1, Nueces County, Texas.

CAUSE NO. 26372-1A

THE ESTATE OF LORENE E. NEE, DECEASED, 26372-1A	*	IN THE PROBATE COURT
	*	
	*	
	*	AT LAW NC. ONE
	*	
AND RELATED CASES PURSUANT TO ORDER CONSOLIDATING AND NUMBERING CASES.	*	NUECES COUNTY, TEXAS

CHARGE OF THE COURT
[relevant portions only]

MEMBERS OF THE JURY:

This case is submitted to you on

special issues consisting of specific questions about the facts which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law you must be governed by the instructions in this Charge. In discharging your responsibility on this Jury you will observe all the instructions which you have previously been given. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

(1) Do no let bias, prejudice or sympathy play any part in your deliberations.

(2) In arriving at your answers consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration

under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the Court. In your deliberations you will not consider or discuss anything that is not represented by the evidence in this case.

(3) Since every answer that is required by the Charge is important, no Juror should state or consider that any required answer is not important.

(4) You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the question, and do not concern yourself with the effect of the answers.

(5) You will not decide an issue by lot or drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be

reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

(6) You may render your verdict upon the vote of five or more members of the jury. The same five or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than five jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the Presiding Juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the

verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys, and the Judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The Presiding Juror or any other Juror who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in special issues in a sense which varies from the meaning commonly understood, you will be given in this Charge a proper legal definition, which you are bound to accept in place of any other definition or meaning.

III.

The special issues usually begin with the phrase "Do you find from a preponderance of the evidence" that a certain event, act, omission or transaction took place. "PREPONDERANCE OF THE EVIDENCE" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in evidence in this case. You are advised that the preponderance of evidence standard will apply as to each Special Issue unless otherwise instructed that a clear and convincing standard applies.

IV.

A spouse's "SEPARATE PROPERTY" consists of: (1) the property owned or claimed by the spouse before marriage; (2) the property acquired by the spouse during the marriage by gift, devise or descent.

V.

"COMMUNITY PROPERTY" consists of the property, other than separate property, acquired by either spouse during marriage.

VI.

(a) A "PRESUMPTION" is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action.

(b) All property possessed by husband and wife upon dissolution of marriage by divorce or death is presumed to be community property.

(c) The community presumption is discharged if a spouse, or one claiming through a spouse, can trace by clear and convincing evidence, the identity of property claimed as separate property; when the evidence shows that separate and community property have been so commingled as to defy resegregation and

identification, the burden is not discharged and the statutory presumption that the entire mass is community controls the disposition.

VII.

(a) When separate and community funds are mixed in an account, it is presumed that the first funds withdrawn are the community funds.

(b) In tracing and identifying such separate property from acquisition to the dissolution of marriage by death or divorce, one dollar has the same value as another and under the law there can be no commingling by the mixing of dollars when the number owned by each claimant is known.

VIII.

A power of attorney is an instrument in writing by which one person as principal, appoints another as agent and confers upon him the authority to perform

acts on behalf of the principal.

After you retire to the jury room, you will select your own Presiding Juror. The first thing the Presiding Juror will do is to have this complete Charge read aloud and then you will deliberate upon your answers to the questions asked.

ROBERT J. VARGAS, JUDGE
County Court at Law No.

SPECIAL ISSUE NUMBER 1

Do you find from a preponderance of the evidence that the 2000 shares of Briner Pain Manufacturing Company, Inc. stock was issued to John W. Nee prior to marriage of John W. Nee and Lorene E. Nee?

Answer "Yes" or "No."

Answer: Yes

SPECIAL ISSUE NUMBER 2

What do you find from a

preponderance of the evidence to be the value per share of the 2,000 shares of the Briner Paint Manufacturing Company, Inc. stock on June 3, 1967 and the value per share on April 10, 1984.

Answer in dollars and cents per share for each date:

Answer: June 3, 1967 $ 25.00

April 10, 1984 $ 467.51

SPECIAL ISSUE NUMBER 3

What percentage, if any, do you find from a preponderance of the evidence, of the efforts and actions of John W. Nee from June 3, 1967 through May 31, 1984, contributed to the increase in value of the 2,000 shares of Briner Paint Manufacturing Company, Inc. and what percentage was necessary to preserve the separate estate, if any.

In answering special issue number 3 you may consider any or all of the

following:

(1) time, toil, and talent expended by John W. Nee in increasing the value of the stock.

(2) time, toil, and talent of John W. Nee that was reasonably necessary to manage and preserve the separate estate.

(3) retained corporate profits of Briner Paint Manufacturing Company, Inc. during such period.

Answer by stating the percentage, if any opposite each item below.

ANSWER: Percentage to increase value of stock 60 %

Percentage to preserve the separate estate 10 %

SPECIAL ISSUE NUMBER 4

Do you find from a preponderance of the evidence that the monies paid for the 2,000 shares of stock by Briner Paint Manufacturing Company, Inc. under the Buy-Sell Agreement represents deferred

compensation of John W. Nee?

You are instructed that "deferred compensation" is compensation which will be taxed when received or upon the removal of certain restrictions upon receipt, and not when earned.

Answer "Yes" or "No."

Answer: Yes

SPECIAL ISSUE NUMBER 5

What sum of money do you find from a preponderance of the evidence would have been reasonable total compensation to be paid to John W. Nee by Briner Paint Manufacturing Company, Inc. for his services to the company from January 3, 1967 through May 31, 1984.

In answering the following special issue number 5, from the period of June 3, 1967 through May 31, 1984, you may consider any or all of the following:

(1) time, toil, talent, work, effort and experience John W. Nee devoted to Briner Paint Manufacturing Company Inc. during such period.

(2) retained corporate profits of Briner Paint Manufacturing COmpany, Inc. during such period.

(3) reasonable amount of compensation or salary others similarly situated would have received for such time, toil, talent, work, effort and experience during such period.

(4) Compensation includes, salary, commissions, bonuses, dividends, pension plans, profit sharing plans, and other fringe benefits during such period.

You should not diminish your finding by any amount to take into consideration

the community estate.

Answer in dollar and cents, if any.

ANSWER: 1,269,890.00

SPECIAL ISSUE NUMBER 6

What amount of compensation, if any, from any source originating from Briner Paint Manufacturing Company, do you find from a preponderance of the evidence, John W. Nee received from June 3, 1967 through May 31, 1984?

Compensation includes, salary, commissions, bonuses, dividends, pension plans, and profit sharing plans, (excluding fringe benefits, such as the automobile, provided by the Briner Paint Manufacturing Company, Inc.) during such period.

Answer in Dollars and Cents, if any:

Answer: $ 1,254,890.00

SPECIAL ISSUE NUMBER 7

What amount if any do you find from

a preponderance of the evidence was the reasonable value of the fringe benefits during the above period which would include the automobile provided to John W. Nee by Briner Paint Manufacturing Company, Inc.

Answer in Dollars and Cents, if any.

Answer: $ 15,000.00

SPECIAL ISSUE NUMBER 8

Do you find from a preponderance of the evidence that John W. Nee signed the signature card of the Navy Army Federal Credit Union account number 20989 with the intent to waive any community interest in the account?

You are hereby instructed that a person waives a right when the person intentionally relinquishes a known, existing right or there is intentional conduct on the persons part which is inconsistent with

claiming the right.

Answer "Yes" or "No."

Answer: No

SPECIAL ISSUE NUMBER 9

Do you find from clear and convincing evidence that any of the monies deposited in the certificate of deposit or the checking account in the Navy Army Federal Credit Union Number 20989 is the separate property of Lorene E. Nee as of May 31, 1984?

You are hereby instructed that "clear and convincing evidence" is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

Answer "Yes" or "No" as to each listed item, if any:

Answer: Certificate of Deposit Yes

Checking Account Yes

If you answered any portion of special issue number 9 above "yes" then answer special issue number 10, otherwise do not answer same.

SPECIAL ISSUE NUMBER 10

What amount of money, if any, do you find from clear and convincing evidence, in the Army Navy Federal Credit Union certificate of deposit and the checking account no. 20989, to be the separate property of Lorene E. Nee as of May 31, 1984?

You are hereby instructed that "clear and convincing evidence" is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

Answer in Dollars and Cents, if any,

as to each item:

Answer: Certificate of Deposit

$25,000.00

Checking Account $ 8,609.00

SPECIAL ISSUE NUMBER 11

Do you find from clear and convincing evidence that any of the monies deposited in the Merrill, Lynch account No. 532-45782 is the separate property of Lorene E. Nee as of May 31, 1984?

You are hereby instructed that "clear and convincing evidence" is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

Answer "Yes" or "No".

Answer Yes

If you answered special issue number

11 above "yes" then answer special issue number 12, otherwise do not answer same.

SPECIAL ISSUE NUMBER 12

What amount of money, if any, do you find from clear and convincing evidence, in the Merrill, Lynch account no. 532-45782 to be the separate property of Lorene E. Nee as of May 31, 1984?

You are hereby instructed that "clear and convincing evidence" is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

Answer in Dollars and Cents, if any:

Answer: $ 38,388.00

* * * * * * * *

SPECIAL ISSUE NUMBER 23

What sum of money do you find from a preponderance of the evidence to be

attorneys' fees reasonable in relation to the work expended or to be expended by the Executor of the Estate of Lorene E. Nee's attorney in this case as follows:

(a) For legal services rendered in the preparation and trial of this cause in this Court, if any?

Answer in Dollars and cents if any:

ANSWER: $ 142,105.74

(b) For legal services if this case is appealed to the Court of Appeals, if any?

Answer in Dollars and cents if any:

ANSWER: $ 10,000.00

(c) For legal services for making or responding to an application for writ of error in the Supreme Court of Texas, if any?

Answer in Dollars and cents if any:

ANSWER: $ 7,500.00

(d) For legal services if the

application for writ of error is granted by the Supreme Court of Texas, if any?

Answer in dollars and cents, if any:

Answer: $ 3,500.00

(e) For legal services if appeal or writ or certiorari is filed in the United States Supreme Court, if any?

Answer in dollars and cents, if any:

Answer: $ 1,500.00

(f) For legal services of appeal or writ of certiorari is granted in the United States Supreme Court, if any?

Answer in dollars and cents if any:

ANSWER: $ 1,500.00

SPECIAL ISSUE NO. 24

Do you find by clear and convincing evidence that the 150 units of M.I.T. bonds, series #112, purchased on or about April 30, 1984 by John W. Nee and Lorene E. Nee were paid for with any of John W. Nee's separate funds, if any?

You are hereby instructed that "clear and convincing evidence" is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

Answer "We do" or "We do not".

Answer We do not

SPECIAL ISSUE NO. 25

If you have answered Issue No. 24 "We do", then answer Issue No. 25; otherwise do not answer Issue No. 25.

What sum of money do you find by clear and convincing evidence was used from John W. Nee's separate funds, if any, to purchase the 150 units of M.I.T. Bonds, series #112 on or about April 30, 1984.

You are hereby instructed that "clear and convincing evidence" is

that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

Answer in Dollars and Cents

Answer: N/A

SPECIAL ISSUE NO. 26

Do you find by clear and convincing evidence that the 150 units of M.I.T. Bonds, series #68 purchased on or about May 22, 1984 by John W. Nee and Lorene E. Nee were paid for with any of John W. Nee's separate funds, if any?

You are hereby instructed that "clear and convincing evidence" is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

Answer "We do" or "We do not".

Answer We do not

SPECIAL ISSUE NO. 27

If you answered Issue No. 26 "We do", then answer Issue No. 27; otherwise do not answer Issue No. 27.

What sum of money do you find by clear and convincing evidence was used from John W. Nee's separate funds, if any, to purchase the 150 units of M.I.T. Bonds, series #68 on or about May 22, 1984?

You are hereby instructed that "clear and convincing evidence" is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

Answer in Dollars and Cents

Answer: N/A

SPECIAL ISSUE NO. 28

Do you find from clear and convincing evidence that subsequent to the death of Lorene E. Nee on May 31, 1984, that John W. Nee paid community debts from his separate funds?

You are hereby instructed that "clear and convincing evidence" is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

Answer "We do" or "We do not".

Answer We do not

SPECIAL ISSUE NO. 29

If you have answered Issue No. 28 "We do", then answer Issue No. 29; otherwise, do not answer Issue No. 29.

Do you find from a preponderance of the evidence that Counter-Plaintiffs are

entitled to reimbursement from the Estate of Lorene E. Nee for the payment of community debts from the separate funds of John W. Nee?

Answer "We do" or "We do not".

Answer: N/A

SPECIAL ISSUE NO. 30

If you have answered Issue No. 29 "We do", then answer Issue No. 30, otherwise do not answer Issue No. 30.

What sum of money, if any, do you find by clear and convincing evidence would reimburse Counter-Plaintiffs for the payment of community debts from the separate funds of John W. Nee?

You are hereby instructed that "clear and convincing evidence" is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations

sought to be established.

Answer in Dollars and Cents

Answer: N/A

SPECIAL ISSUE NO. 31

What sum of money, if any, do you find from a preponderance of the evidence to be the reasonable value of attorney's fees necessary for legal services by Defendants' and Counter-Plaintiffs' attorney?

A. For legal services rendered in preparation and trial of this cause in this Court?

Answer in Dollars and Cents, if any.

Answer: $ 130,636.25

B. For legal services to be rendered if this case is appealed to the Court of Appeals?

Answer in Dollars and Cents, if any.

Answer: $ 10,000.00

C. For legal services to be rendered if

this case is appealed to the Supreme Court of Texas?

Answer in Dollars and Cents, if any.

Answer: $ 7,500.00

CERTIFICATE

We, the Jury, have answered the above and foregoing issues as herein indicated, and herewith return same into court as our verdict.

(To be signed by the Presiding Juror if unanimous.)

/s/ Lawrence C. Johnson

(To be signed by those rendering the verdict if not unanimous. You may render your verdict upon the vote of five or more members of the jury. The same five or more of you must agree upon all of the answers made and to the entire verdict.)

_____

_____

_____

10. Trial Court Judgment in cause no. 26372-1, County Court at Law No. 1, Nueces County, Texas entered June 30, 1988.

CAUSE NO. 26372-1A

THE ESTATE OF LORENE E. NEE, DECEASED, 26372-1A	*	IN THE PROBATE COURT
	*	
	*	
	*	AT LAW NO. ONE
	*	
AND RELATED CASES PURSUANT TO ORDER CONSOLIDATING AND NUMBERING CASES.	*	NUECES COUNTY, TEXAS

JUDGMENT

On the 19th day of October, 1987, came on to be heard the above numbered and styled cause of action. Paul J. Erlandson, Independent Executor of the Estate of Lorene E. Nee and Paul J. Erlandson and Sandra van der Es-Erlandson, individually Plaintiffs appeared through their counsel of record,

William H. Berry, Jr. and the International Bank of Corpus Christi, Independent Administrator of the Estate of John W. Nee, and the John W. Nee heirs, David Nee, John R. Nee, Michael G. Nee, and Linda Nee, appeared through their counsel of record, Charles R. Cunningham. Andrew J. Lehrman was present as the individual counsel for the International Bank of Corpus Christi. At the conclusion of the evidence, the Court submitted the case to the jury on December 7, 1987, and the jury returned a verdict on or about December 10, 1987.

STIPULATED AND AGREED DIVISION OF PROPERTY

It is ORDERED, ADJUDGED and DECREED that the property in paragraphs 1 through 19 listed and specified immediately below represents the property and funds stipulated by the parties to be community property or specified percentages of said

property be to community or separate property of the parties and to be distributed as follows:

1. Sixty-four (64%) percent of the house located at 714 St. Pius, Corpus Christi, Nueces County, Texas shall be distributed to the Estate of Lorene E. Nee, as defendants have admitted that sixty-four (64%) percent is separate property of Lorene E. Nee, which belongs to the Estate of Lorene E. Nee. The $9,000.00 down payment on the house constituted the separate property of Lorene E. Nee and the community interest in the house of Lorene E. Nee, her estate vested a sixty-four (64%) percent of the interest in the house at the time of her death to the Plaintiffs, Paul J. Erlandson and Sandra van der Es-Erlandson, as a matter of law, at the time of Lorene E. Nee's death. The

remaining thirty-six (36%) percent interest of John W. Nee was left to Paul J. Erlandson and Sandra van der Es-Erlandson pursuant to the will of John W. Nee filed for probate in County Court at Law No. 3 of Nueces County, Texas, cause number 28208-3.

2. One half of the property located in the Merrill Lynch account number 532 36829 totalling $57,047.00 as listed in the inventory of the Estate of Lorene E. Nee shall be distributed to the Estate of Lorene E. Nee as it is undisputed in the pleadings and the evidence presented at trial that this account is the community property of Lorene E. Nee and John W. Nee. The Court enters judgment for the Estate of Lorene E. Nee, for $28,523.50, (which is one-half (1/2) the community interest on the $57,047.00, the amount in the account on

May 31, 1984) plus one-half (1/2) pro rata community share of the earnings, dividends, and distributions on the account from Lorene E. Nee's death until date of payment to her Independent Executor, Paul J. Erlandson. 3. One half the property in the 116.020 Merrill Lynch Capital Fund account (144.818 John W. Nee) listed in the inventories of Lorene E. Nee (in the amount of $2,006.00) and John W. Nee (in the amount of $3,424.95) shall be distributed to the Estate of Lorene E. Nee as it is undisputed in the pleadings and the evidence presented at trial that this account is the community property of Lorene E. Nee and John W. Nee on the date of their deaths. The court enters judgment for the Estate of Lorene E. Nee for $1,712.48, which is the Estate's community interest on the date of

decedents death, in the value plus one-half (1/2) pro rata community share of earnings, dividends, and distributions on the account from the date of Lorene E. Nee's death until date of payment to her Independent Executor, Paul J. Erlandson.

4. One half the property in the 102.221 Merrill Lynch Basic Value Fund account (139.579 John W. Nee) listed in the inventories of Lorene E. Nee (in the amount of $1,354.00) and John W. Nee (in the amount of $2,331.20), shall be distributed to the Estate of Lorene E. Nee as it is undisputed in the pleadings and the evidence presented at trial that this account is the community property of Lorene E. Nee and John W. Nee on the date of their deaths. The Court enters judgment for the Estate of Lorene E. Nee for $1,165.60, which is the Estate's community interest in the value on the

date of decedents death, plus one-half (1/2) pro rata community share of earnings, dividends, and distributions on the account from the date of Lorene E. Nee's death until date of payment to her Independent Executor, Paul J. Erlandson.

5. One-half community interest of Suave Shoe Corporation Stock, 108 Shares listed on the Lorene E. Nee Estate Inventory, shall be distributed to the Estate of Lorene E. Nee as it is undisputed in the pleadings and the evidence presented at trial that this stock is the community property of Lorene E. Nee and John W. Nee on the date of their deaths. The Court enters judgment for the Estate of Lorene E. Nee for one-half (1/2) of the stock plus one-half of all dividends and distributions, stock splits from the date of her death until date of payment to Paul J. Erlandson,

Independent Executor to be distributed in kind, and if the estates cannot agree to an in-kind distribution or an in-kind distribution becomes infeasible, then the stock is ordered sold and the proceeds from the sale of the stock be distributed equally between the respective estates.

6. One-half of the community interest in the Walt Disney Stock listed in the inventories of Lorene E. Nee (130.2 listed in the Lorene E. Nee inventory) and John W. Nee (538.873 listed and totalling $22,666.00 on the John W. Nee inventory), shall be distributed to the Estate of Lorene E. Nee as it is undisputed in the pleadings and the evidence presented at trial that this account is the community property of Lorene E. Nee and John W. Nee. The Court enters judgment for the Estate of Lorene E. Nee for one-half (1/2) of the stock,

plus one-half (1/2) of all dividends, distributions, and stock splits from the date of her death until payment to her Independent Executor, Paul J. Erlandson. The Walt Disney stock is to be distributed in kind, and if the estates cannot agree to an in-kind distribution or an in-kind distribution becomes infeasible, then the stock is ordered sold and the proceeds from the sale of the stock be distributed equally between the respective estates.

7. One-half community interest of the Dreyfus Leverage Fund, Inc. listed in the inventories of Lorene E. Nee (in the amount of $5,028.00) and John W. Nee (in the amount of $9,293.53), shall be distributed to the Estate of Lorene E. Nee as it is undisputed in the pleadings and the evidence presented at trial that this account is the community property of

Lorene E. and John W. Nee. The Court enters judgment for the Estate of Lorene E. Nee for $4,646.77, which represents the Lorene E. Nee Estate's one-half community interest in the value on the date of decedents death, plus one-half (1/2) pro rata community share of earnings, dividends, and distributions on the account from the date of Lorene E. Nee's death until date of payment to her Independent Executor, Paul J. Erlandson.

8. One half of the Keystone Account Series S-4 listed in the inventory of Lorene E. Nee (in the amount of $3,094.00) and John W. Nee (in the amount of $4,201.76), shall be distributed to the Estate of Lorene E. Nee as it is undisputed in the pleadings and the evidence presented at trial that this account is the community property of Lorene E. Nee and John W. Nee. The Court

enters judgment for the Estate of Lorene E. Nee for $2,100.88, which represents the Lorene E. Nee Estate's one-half community interest in the value on the date of Lorene E. Nee's death, plus one-half (1/2) pro rata share of earnings, dividends, and distributions on the account from the date of Lorene E. Nee's death until date of payment to her Independent Executor, Paul J. Erlandson.

9. One-half of the funds in the certificate of deposit at Citizen's State Bank No. 032476, listed in the inventory of Lorene E. Nee (in the amount of $30,204.00) shall be distributed to the Estate of Lorene E. Nee as it is undisputed in the pleadings and the evidence presented at trial that this account is the community property of Lorene E. Nee and John W. Nee. The Court enters judgment for the Estate of Lorene

E. Nee for $15,102.00, which represents the Lorene E. Nee Estate's one-half community interest in the value on the date of decedents death, plus one-half (1/2) pro rata share of earnings, dividends, and distributions on the amount from the date of Lorene E. Nee's death until date of payment to her Independent Executor, Paul J. Erlandson. Because the Lorene E. Nee community portion of these funds totalling $30,204.00 were expended by Michael G. Nee pending the administration of this estate, the court hereby directs The International Bank of Corpus Christi, the Independent Administrator of the Estate of John W. Nee, or its successor Administrator, to pay and offset out of funds on deposit representing John W. Nee's community share to Paul J. Erlandson, Independent Executor of the

Estate of Lorene E. Nee, $15,102.00, from the proceeds of the John W. Nee community property in the Independent Administrator's possession or which may come into its possession in the future. The Court enters judgment for the Estate of Lorene E. Nee for prejudgment and post judgment interest at the highest legal rate on the foregoing amount from date of Lorene E. Nee's death until paid to the Independent Executor, Paul J. Erlandson.

10. One-half of the certificate of deposit at Corpus Christi National Bank CD 010-0031731 (MBank CD 36244 John W. Nee) and all subsequent renewals of same as listed in the inventories of Lorene E. Nee (in the amount of $10,095.00) and John W. Nee (in the amount of $11,497.93), shall be distributed to the Estate of Lorene E. Nee as it is undisputed in the pleadings and the

evidence presented at trial that this account is the community property of Lorene E. Nee and John W. Nee. The Court enters judgment for the Estate of Lorene E. Nee for $5,748.97, which represents the Lorene E. Nee Estate's one-half community interest in the value on the date of decedents death, plus one-half (1/2) pro rata community share of earnings, dividends, and distributions on the account from the date of Lorene E. Nee's death until date of payment to her Independent Executor, Paul J. Erlandson.

11. One-half of the certificate of deposit at Corpus Christi National Bank CD 010-0031732 (MBank CD 36245 John W. Nee) and all subsequent renewals of same, listed in the inventories of Lorene E. Nee (in the amount of $15,142.00) and John W. Nee (in the amount of $17,246.91), shall be distributed to the

Estate of Lorene E. Nee as it is undisputed in the pleadings and the evidence presented at trial that this account is the community property of Lorene E. Nee and John W. Nee. The Court enters judgment for the Estate of Lorene E. Nee for $8,623.46, which represents the Lorene E. Nee Estate's one-half community interest in the value on the date of decedents death, plus one-half (1/2) pro rata community share of earnings, dividends, and distributions on the account until date of payment.

12. One-half of the certificate of deposit at Corpus Christi National Bank CD 010-0034568 (MBank CD 34568 John W. Nee) and all subsequent renewals of same as listed in the inventories of Lorene E. Nee (in the amount of $20,163.00) and John W. Nee (in the amount of $22,995.88), shall be distributed to the

Estate of Lorene E. Nee, as it is undisputed in the pleadings and the evidence presented at trial that this account is the community property of Lorene E. Nee and John W. Nee. The Court enters judgment for the Estate of Lorene E. Nee for $11,497.94 which represents the Lorene E. Nee Estate's one-half community interest in the value on the date of decedents death, plus one-half (1/2) pro rata community share of earnings, dividends, and distributions on the account until date of payment to her Independent Executor, Paul J. Erlandson.

13. One-half of the amounts in the checking account at Corpus Christi National Bank no. 275-810-5 listed in the inventory of Lorene E. Nee in the amount of $2,331.00 at the time of Lorene E. Nee's death, shall be distributed to the Estate of Lorene E. Nee, as it is

undisputed in the pleadings and the evidence presented at trial that this account is the community property of Lorene E. Nee and John W. Nee. The Court enters judgment for the Estate of Lorene E. Nee for $1,165.50, which represents the Lorene E. Nee Estate's one-half community interest in the value on the date of decedents death, plus one-half (1/2) pro rata share of earnings, dividends, and distributions on the amount from the date of Lorene E. Nee's death until date of payment to her Independent Executor, Paul J. Erlandson. Because the Lorene E. Nee community portion of these funds were spent by Michael G. Nee pending the administration of this estate, the court orders The International Bank of Corpus Christi, the Independent Administrator of the Estate of John W. Nee, or its successor

Administrator, to pay an offset out of the funds on deposit with the International Bank of Corpus Christi, from the Estate of John W. Nee's community share to Paul J. Erlandson, Independent Executor, this amount from the proceeds of the John W. Nee community property in the Independent Administrator's possession or which may come into its possession in the future. The Court enters judgment for the Estate of Lorene E. Nee for prejudgment and post judgment interest at the highest legal rate on the foregoing amount from date of Lorene E. Nee's death until paid to the Independent Executor, Paul J. Erlandson, to be paid from the Estate of John W. Nee's community share of funds.

14. One-half of the monies in the savings account on the date of the death of Lorene E. Nee at Citizen's State Bank

no. 0571028600 listed in the inventory of Lorene E. Nee in the amount of $5,600.00 shall be distributed to the Estate of Lorene E. Nee, as it is undisputed in the pleadings and the evidence presented at trial that this account is the community property of Lorene E. Nee and John W. Nee. The Court enters judgment for the Estate of Lorene E. Nee in the amount of $2,800.00, which represents the Lorene E. Nee Estate's one-half community interest in the value on the date of decedents death, plus one-half (1/2) pro rata share of earnings, dividends, and distributions on the amount from the date of Lorene E. Nee's death until date of payment to her Independent Executor, Paul J. Erlandson. Because the Lorene E. Nee community portion of these funds were expended by Michael G. Nee pending the administration of this estate, the Court orders The

International Bank of Corpus Christi, the Independent Administrator of the Estate of John W. Nee, or its successor Administrator, to pay an offset from the funds on deposit with or under the control of the International Bank of Corpus Christi, the Independent Administrator of the Estate of John W. Nee, or its successor Administrator, from the community share of the funds of the Estate of John W. Nee to Paul J. Erlandson, Independent Executor, this amount from the proceeds of the John W. Nee community property in the Independent Administrator's possession or which may come into its possession in the future. The Court enters judgment for the Estate of Lorene E. Nee for prejudgment and post judgment interest at the highest legal rate on the foregoing amount from date of Lorene E. Nee's death until paid to the

Independent Executor, Paul J. Erlandson to be paid from the community share of the funds of the Estate of John W. Nee.

15. The Civil Service Retirement Lump Sum payment, claim number 1-523-21L, in the amount of $229.00 was the community funds of Lorene E. Nee and John W. Nee and shall be distributed equally to Paul Erlandson and Sandra van der Es-Erlandson, as named beneficiaries on the account.

16. The Individual Retirement Account of Lorene E. Nee in the amount of $2,025.00 be paid to the estate of John W. Nee plus earnings, dividends, and distributions to John W. Nee Estate.

17. One-half community interest in the 1980 Buick La Sabre valued at $5,900.00 and the 1975 Buick Regal valued at $900.00 listed in the inventory of Lorene E. Nee shall be distributed to the

Estate of Lorene E. Nee, as it is undisputed in the pleadings and the evidence presented at trial that this property was the community property of Lorene E. Nee and John W. Nee on the date of their deaths. The Court enters judgment for the Estate of Lorene E. Nee for $2,950.00 and $450.00, which represents the Lorene E. Nee Estate's one-half community interest in the value on the date of decedents death.

18. One-half of the stamp and coin collection listed on the inventory of Lorene E. Nee be found to be the community property of the estate of Lorene E. Nee and John W. Nee shall be distributed to the Estate of Lorene E. Nee as the evidence is undisputed that the coin and stamp collection belonged to the community estate. One-half community interest in the stamp collection (valued

at $6,040.00) and for the coin collection (valued at $2,688.20) that the collections be divided in kind between the estates. If the parties cannot agree to an in-kind distribution, then the court orders that the collections will be sold and the proceeds distributed equally between the respective estates. The court hereby orders, Michael G. Nee, Linda Nee Beck, John R. Nee, and David Nee, to immediately turn over the stamp and coin collections to the possession of the International Bank of Corpus Christi, Independent Administrator of the Estate of John W. Nee, or its successor Administrator.

19. The parties stipulated and the court finds from the evidence that John R. Nee, David Nee, and Linda Nee, ratified and affirmed all the acts of Michael G. Nee after the death of Lorene

E. Nee as it is undisputed in the pleadings and the evidence presented at trial that John R. Nee, David Nee, and Linda Nee ratified and affirmed all the acts of Michael G. Nee.

It is further ORDERED, ADJUDGED, and DECREED that judgment is entered for the Estate of Lorene E. Nee, for prejudgment and post judgment interest allowed by law at the highest legal rate on the monies and funds to be distributed to the Estate of Lorene E. Nee specified in paragraphs 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, and 14 immediately above, from the date of Lorene E. Nee's death until paid to the Independent Executor, Paul J. Erlandson. It is further ORDERED, ADJUDGED, and DECREED that the interest shall be calculated by the International Bank of Corpus Christi at the highest legal rate as allowed by law, compounded daily, on

the amounts to be distributed to the Estate of Lorene E. Nee as specified in paragraphs 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, and 14 immediately above, and paid to the Independent Executor of the Estate of Lorene E. Nee from the community portion of funds belonging to the Estate of John W. Nee.

It is further ORDERED, ADJUDGED, and DECREED that Plaintiff's shall recover prejudgment interest calculated at ten (10%) percent compounded daily from November 30, 1988, through the date of Judgment on the amounts in paragraphs 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, and 14 totalling $83,087.10, for prejudgment interest of $35,839.48.

JURY VERDICT

The charge of the court, including the special issues, and the verdict of the jury, are incorporated herein for all

purposes by reference. It appearing to the Court that the verdict of the jury was for the Plaintiffs and against the Defendants based on the jury's finding that the proceeds from the sale in April of 1984 of 2,200 shares of Briner Paint Manufacturing Company, Inc. stock prior to Lorene E. Nee's death was deferred compensation. Further, because the jury failed to make affirmative findings in favor of the Defendants on the issues of tracing; and because the Defendants failed to plead and or submit the five annual $183,125.56 installment payments made pursuant to the April 1984 Briner Paint Manufacturing Company, Inc. promissory note securing the sale, for tracing to the jury, community property presumption applies, and the funds in the accounts and the amounts due from installment payments due and owing under

the promissory note executed by the Briner Paint Manufacturing Company, Inc. in April of 1984, are the community property of John W. Nee and Lorene E. Nee at the time of Lorene E. Nee's death, and it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. Two hundred (200) shares of Briner Paint Manufacturing Co., Inc. stock was stipulated by the parties, admitted by the pleadings of the defendants, and the evidence produced at trial the principal and interest of the sale distributed and payable on the 200 shares of Briner Paint Manufacturing Company, Inc. stock was community property. The Lorene E. Nee's community share should be distributed to the Independent Executor of the Lorene E. Nee Estate along with the interest earned on that amount subsequent to the death of

Lorene E. Nee pro rata on the one-half (1/2) community share.

2. One-half community interest in the down payment of $257,130.50 from the April 1984 sale of the 2,200 shares of Briner Paint Mfg. Co., Inc. stock represents community property based on the jury's findings that the stock proceeds was deferred compensation; also because of the negative jury findings in special issue numbers 24 through 30; and because the property was not traced as separate property of John W. Nee, the community property presumption controls.

3. One-half community interest in each of the five annual installment payment of $183,125.56 each from the April 1984 sale of the Briner Paint Mfg. Co., Inc. stock represents community property based on the jury's findings that the stock proceeds was the deferred

compensation of John W. Nee. The installment payments further represent community property because of the Defendants failure to trace each of the installment payments to separate funds of John W. Nee, and thus the community property presumption controls making the interest due and payable under the installment payments community property. Further the principal portion of each of the payments represents the community property of John W. Nee and Lorene E. Nee because of the jury's findings that the sale of the stock represented deferred compensation of John W. Nee during the marriage. Further, the payments represent community property of John W. Nee and Lorene E. Nee because of the defendants failure to trace the principal and interest installment payments as the separate property of John W. Nee. It is

therefore ORDERED, ADJUDGED, and DECREED that the Lorene E. Nee Estate shall be entitled to one-half of each of the five (5) annual installments as follows:

a. $91,562.78, which is one-half the community interest of the $183,125.56 payment from the April 1984 sale of the 2,200 share of Briner Paint Manufacturing Company, Inc. stock plus the interest payable thereunder, paid to defendants on or about April 10, 1985. The International Bank of Corpus Christi, Independent Administrator of the Estate of John W. Nee, or its successor Administrator, is hereby ORDERED to distribute the 1985 payment of $91,562.78 to the Independent Executor of the Estate of Lorene E. Nee from the community portion of the funds belonging to

the John W. Nee Estate.

b. $91,562.78, which is one-half the community interest of the $183,125.56 payment from the April 1984 sale of the Briner Paint Manufacturing Company, Inc. stock plus the interest payable thereunder, paid to defendants on or about April 10, 1986. The International Bank of Corpus Christi, Independent Administrator of the Estate of John W. Nee, or its successor Administrator, is hereby ORDERED to distribute the 1986 payment of $91,562.78 to the Independent Executor of the Estate of Lorene E. Nee from the community portion of the funds belonging to the John W. Nee Estate.

c. $91,562.78, which is one-half the community interest of the

$183,125.56 payment from the April 1984 sale of the Briner Paint Manufacturing Company, Inc. stock plus the interest payable thereunder, paid to defendants on or about April 10, 1987. The $91,562.78 shall be paid from the 1987 installment payment made by Briner Paint Manufacturing Company, Inc. to the International Bank of Corpus Christi. If there are insufficient funds left remaining in which to pay all or any portion of the $91,562.78 to the Independent Executor of the Estate of Lorene E. Nee, then it is hereby ORDERED that such deficiency shall be distributed by the International Bank of Corpus Christi, the Independent Administrator of the Estate of John W. Nee, or its successor

Administrator, from the community portion of the Estate of John W. Nee.

d. $91,562.78, which is one-half the community interest of the $183,125.56 payment from the April 1984 sale of the Briner Paint Manufacturing Company, Inc. stock plus the interest payable thereunder, of which payment was made on or about April 10, 1988 to the International Bank of Corpus Christi, Independent Administrator of the Estate of John W. Nee. The $91,562.78 shall be paid from the 1988 installment payment made by Briner Paint Manufacturing Company, Inc. to the International Bank of Corpus Christi. If there are insufficient funds left remaining in which to pay all or any portion of

the $91,562.78 to the Independent Executor of the Estate of Lorene E. Nee, then it is hereby ORDERED that such deficiency shall be distributed by the International Bank of Corpus Christi, the Independent Administrator of the Estate of John W. Nee, or its successor Administrator, from the community portion of the funds belong to the Estate of John W. Nee.

e. $91,562.78, which is one-half the community interest of the $183,125.56 payment from the April 1984 sale of the Briner Paint Manufacturing Company, Inc. stock plus the interest payable thereunder, of which payment is to be made on or about April 10, 1989. The International Bank of Corpus Christi, the Independent

Administrator of the Estate of John W. Nee, or its successor Administrator, is hereby ORDERED to distribute to the Independent Executor of the Estate of Lorene E. Nee $91,562.78 upon the payment by Briner Paint Manufacturing Company, Inc. to the International Bank of Corpus Christi, the Independent Administrator of the Estate of John W. Nee, or its successor Administrator, of the 1989 installment payment in the amount of $183,125.56 and to pay all deficiencies, if any, from the John W. Nee Estate community portion of this payment.

4. The International Bank of Corpus Christi, the Independent Administrator of the Estate of John W. Nee, or its successor Administrator, is

hereby ORDERED to pay to the Independent Executor of the Estate of Lorene E. Nee, its $91,562.78 share per year under each of the 1985, 1986, 1987, and 1988, payments immediately upon entry of the judgment, and that the Briner Paint Mfg. Co., Inc. is hereby ORDERED to distribute one-half (1/2) of the 1989 payment to the respective estates at the time of payment and the International Bank of Corpus Christi, the Independent Administrator of the John W. Nee Estate, or its successor Administrator, is ORDERED to hold in escrow such of these funds to satisfy any deficiency the Lorene E. Nee estate may have due under the judgment entered herein, including but not limited to prejudgment and post judgment interest at the highest legal rate and attorney fees.

It is further ORDERED, ADJUDGED, and DECREED that the payments shall earn

prejudgment interest at the rate of ten (10%) percent compounded daily beginning from the date the payments were to be made pursuant to the Briner Paint Manufacturing Paint Company, Inc. note, which was more than six (6) months following the death of Lorene E. Nee, to be paid to the date of judgment as follows:

(a) One-half (1/2) of $183,125.56 of $91,562.78 from April 10, 1985 through the date of judgment for prejudgment interest of $34,806.03.

(b) One-half (1/2) of $183,125.56 of $91,562.78 from April 10, 1986 through the date of judgment for prejudgment interest of $22,780.87.

(c) One-half (1/2) of $183,125.56 of $91,562.78 from April 10,

1987 through the date of judgment for prejudgment interest of $11,900.02.

(d) One-half (1/2) of $183,125.56 of $91,562.78 from April 10, 1988 through the date of judgment for prejudgment interest of $2,054.58.

It further being the finding of the jury that the Estate of Lorene E. Nee's it is hereby ORDERED, ADJUDGED, and DECREED, that the Estate of Lorene E. Nee, shall be entitled to the entire amount of funds in the Merrill Lynch Account 532 45782 in the amount of $38,388.00 plus the earnings, dividends, and distributions on the account until the date of judgment based upon the jury findings in special issue numbers 11 and 12, it is hereby ORDERED, ADJUDGED, and DECREED that the funds in Merrill Lynch

Account 532 45782 in the amount of $38,388.00 plus earnings, dividends and distributions on the account since the date of Lorene E. Nee's death is the separate property of Lorene E. Nee and shall be distributed to the Lorene E. Nee Estate in whole.

It further being the finding of the jury that the Estate of Lorene E. Nee's shall be entitled to the entire amount of funds in the Navy-Army Federal Employees Credit Union Account No. 20989 for a certificate of deposit in the amount of $25,000.00 and a checking account in the amount of $8,609.00 plus the earnings, dividends, and distributions on the account until the date of judgment based upon the jury findings in special issue numbers 9 and 10, it is hereby ORDERED, ADJUDGED, and DECREED that the funds in Navy-Army Federal Employees Credit Union

Account No. 20980 for a certificate of deposit in the amount of $25,000.00 and a checking account in the amount of $8,609.00 plus the earnings, dividends, and distributions on the account since the date of Lorene E. Nee's death is the separate property of Lorene E. Nee and shall be distributed to the Lorene E. Nee Estate in whole.

It is hereby ORDERED, ADJUDGED, and DECREED that one-half of the bonds in the Eppler Guerin Account No. 023 62000 shall be distributed to the Estate of Lorene E. Nee. These bonds represent the purchase of 150 Units of MIT Series #112 and Series #68 tax exempt bonds, purchased with a portion of deposits of the $115,188.98 of the profit sharing plan proceeds stipulated by the parties to be community, and because of a portion were purchased with a portion of the

$257,130.50 of the Briner down payment which is community property based on the jury's findings that the sale of the Briner Paint Manufacturing Company Inc. stock was deferred compensation of John W. Nee; and because of the negative jury findings in special issue numbers 24 through 30, the property was not traced as separate property of John W. Nee, and the community property presumption controls. The Estate of Lorene E. Nee shall be distributed one-half of the MIT Bond series #68 and series #112, plus one-half (1/2) pro rata share of earnings, dividends, and distributions on the account from the date of Lorene E. Nee's death until date of distribution or payment to Paul J. Erlandson, Independent Executor.

It is ORDERED, ADJUDGED, and DECREED that the Plaintiffs are entitled to

recover prejudgment interest at ten (10%) percent compounded daily from six months following the death of Lorene E. Nee, which is November 30, 1984, through the date of judgment on one-half (1/2) of the $257,130.50, which represents the down payment on the Briner Paint Manufacturing Company, Inc. stock, of which the Lorene E. Nee Estates community interest is $128,565.25 for prejudgment interest in the amount of $55,456.40.

It is ORDERED, ADJUDGED, and DECREED that the Plaintiffs are entitled to recover prejudgment interest at ten (10%) percent compounded daily from six months following the death of Lorene E. Nee, which is November 30, 1984, through the date of judgment on one-half (1/2) of the $115,188.98, which is the payment from the pension and profit sharing plan of Briner Paint Manufacturing Company, Inc.

of which the Lorene E. Nee Estates community interest is $57,594.49 for prejudgment interest in the amount of $24,843.29.

It is hereby ORDERED, ADJUDGED, and DECREED that one-half of the checking account at Corpus Christi National Bank (MBank) no. 651-959-8 in the amount on the Lorene E. Nee Estate Inventory in the amount of $59,277.00 shall be distributed to the Estate of Lorene E. Nee, based on the jury's findings in special issue number 4 that the proceeds from the sale of the 2,000 shares of Briner Paint Mfg. Co., Inc. stock was deferred compensation. Further, the community property presumption controls because of the negative jury findings in special issue numbers 24 through 30, the property was not traced as separate property of John W. Nee, and the community property

presumption controls. It is ORDERED, ADJUDGED, and DECREED that $29,638.50, plus the Estate's one-half community interest in the value on the date of decedents death, plus one-half (1/2) pro rata community share of earnings, dividends, and distributions on the amount from the date of Lorene E. Nee's death until date of payment to the Independent Executor, Paul J. Erlandson shall be distributed to the Estate of Lorene E. Nee. It is hereby ORDERED that the International Bank of Corpus Christi, the Independent Administrator of the Estate of John W. Nee, or its successor Administrator, shall distribute $29,638.50 plus the Lorene E. Nee Estate's one-half community interest in the earnings, dividends, and distributions from the date of Lorene E. Nee's death until payment to be

distributed from the community funds of the Estate of John W. Nee because these funds were expended subsequent to the death of Lorene E. Nee.

If any of the funds ordered to be distributed to the Estate of Lorene E. Nee are no longer in existence, then it is ORDERED, ADJUDGED, and DECREED, that the International Bank of Corpus Christi, Independent Administrator of the Estate of John W. Nee, or its successor Administrator, shall pay the amounts hereinbefore ordered to be distributed to the Independent Executor of the Estate of Lorene E. Nee, to be paid from the community share of the funds from the Estate of John W. Nee which it currently has in its possession or which may come into its possession in the future.

It is ORDERED, ADJUDGED, and DECREED, that the Estate of Lorene E.

Nee, Paul J. Erlandson and Sandra van der Es-Erlandson shall recover their attorney fees based on the jury's findings in special issue number 23 and judgment is entered against the Defendants, International Bank of Corpus Christi, Independent Administrator of the Estate of John W. Nee or its successor, Michael G. Nee, Linda Nee Beck, David Nee and John R. Nee, in the following amounts to be distributed from the community share of funds or property of John W. Nee Estate, as follows:

$142,105.74 attorney fees in the trial of the matter.

$ 10,000.00 attorney fees if appealed to the Court of Appeals.

$ 7,500.00 attorney fees if writ filed in the Texas Supreme Court

$ 3,500.00 attorney fees if writ of error granted by the Texas Supreme Court

$ 1,500.00 attorney fees if appeal or writ of certiorari filed in the U.S. Supreme Court.

$ 1,500.00 attorney fees if appeal or writ of certiorari granted in the U.S. Supreme Court.

It is ORDERED, ADJUDGED, and DECREED that Plaintiffs recover prejudgment interest at ten (10%) percent per annum compounded daily from November 30, 1984, through the date of judgment on the attorney fees incurred through the trial of this matter in the amount of $142,105.74 for prejudgment interest in the amount of $61,297.07.

It is further ORDERED, ADJUDGED, and DECREED, that Miscellaneous property on Schedule F of Inventory of Lorene E. Nee Estate (household property and personal belongings, etc.) admitted in the evidence that is being held by Michael G.

Nee, Linda Beck Nee, David Nee, or John R. Nee, Defendants, on behalf of International Bank of Corpus Christi, Independent Administrator of the Estate of John W. Nee shall be delivered to Independent Executor of the Estate of Lorene E. Nee at a time and place at the direction of the Independent Executor of the Estate of Lorene E. Nee, expenses of delivery in Corpus Christi, Texas, to be borne by the Estate of John W. Nee, and to be paid out of the John W. Nee Estate's community portion.

It is ORDERED, ADJUDGED, and DECREED, that the Estate of Lorene E. Nee shall recover from the Defendants, International Bank of Corpus Christi, Independent Administrator of the Estate of John W. Nee, Michael G. Nee, Linda Nee Beck, John R. Nee, and David Nee, one-half community interest on the premiums

paid on the insurance policies of insurance on John W. Nee, to be paid from the community share of funds of the Estate of John W. Nee, as follows for a total recovery by the Lorene E. Nee Estate against the Defendants from the monies and property belonging to the Estate of John W. Nee, in the total amount of $36,914.31, determined as follows:

1. Policy No. 179,025 Great National Life/U.S. Life 1/2 of $5,322.07 to be reimbursed to Estate of Lorene E. Nee in the amount of $2,661.04
2. Policy No. 161,511, Great National Life/U.S. Life 1/2 of $2,314.02 to be reimbursed to Estate of Lorene E. Nee in the amount of $1,157.01
3. Policy No. 161,695 Great

National Life/U.S. Life 1/2 of $7,316.60 to be reimbursed to Estate of Lorene E. Nee in the amount of $3,568.30

4. Policy No. 180,908 Great National Life/U.S. Life 1/2 of $48,509.04 to be reimbursed to Estate of Lorene E. Nee in the amount of $24,265.52

5. Northwestern National Life Policy No. B739757 1/2 of $3,343.56 to be reimbursed to Estate of Lorene E. Nee in the amount of $1,671.78

6. Northwestern National Life Policy No. 728,949 1/2 of $2,944.40 to be reimbursed to Estate of Lorene E. Nee in the amount of $1,472.20

7. Provident Mutual Life Policy No. 724492 1/2 of $445.74

to be reimbursed to Estate of Lorene E. Nee in the amount of $222.87

8. Provident Mutual Life Policy No. 839,951 1/2 of $899.81 to be reimbursed to Estate of Lorene E. Nee in the amount of $444.91

9. U.S. Life Policy No. 90656 1/2 of $2,901.36 to be reimbursed to Estate of Lorene E. Nee in the amount of $1,450.68

It is ORDERED, ADJUDGED, and DECREED that the Estate of Lorene E. Nee shall recover prejudgment interest at ten (10%) percent compounded daily from November 30, 1984 through the date of judgment on the premiums due the Lorene E. Nee Estate in the amount of $36,914.31, for prejudgment interest in the amount of $15,922.93.

It is ORDERED, ADJUDGED, and DECREED that this judgment shall accrue interest at the rate of ten (10%) percent compounded daily from six months following the date of Lorene E. Nee's death or as otherwise specified and set out in this judgment until the date of judgment. The judgment shall accrue post judgment interest at the highest legal rate on the amount of judgment from the date judgment is entered until paid to the Independent Executor, Paul J. Erlandson, individually, and Sandra van der Es-Erlandson as set out in this judgment.

It is ORDERED, ADJUDGED, and DECREED, that the Estate of John W. Nee, Michael G. Nee, Linda Nee Beck, John R. Nee, and David Nee shall recover their attorney's fees based on the jury's findings in special issue number 31 and

judgment is entered on behalf of the defendants for attorney's fees against the Plaintiffs, Paul J. Erlandson, Independent Executor for the Estate if Lorene E. Nee, in the following amounts to be recovered as follows:

$130,636.25 attorney fees in the trial of the matter.

$ 10,000.00 attorney fees if appealed to the Court of Appeals.

$ 7,500.00 attorney fees if appealed to the Texas Supreme Court.

It is ORDERED, ADJUDGED, and DECREED that Defendants recover prejudgment interest at ten (10%) percent per annum compounded daily from November 30, 1984, through the date of judgment on the attorney fees incurred through the trial of this matter in the amount of $130,636.25 for prejudgment interest in the amount of $56,291.81.

Court costs are adjudged against the defendants.

Signed the _____ day of

_____, 19___.

_____

Judge Presiding

Summary of Statement of Facts Supporting Deferred Compensation Findings and Property Characterized as Community:

11. SUMMARY OF STATEMENT OF FACTS

John W. Nee had three wives with four children born of his first two marriages. Lorene E. Nee was a widow from Georgia with two children and a substantial estate from her first marriage. It was her separate funds which were used to purchase the home of John and Lorene Nee.

John W. and Lorene E. Nee were married on June 3, 1967.[1] John W. Nee was a chemist and principal at Briner.[2] He was a key employee, officer, and director of Briner.[3] He obtained 2,000 shares of

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[1] (Vol. 14, p. 16. l. 2-3)

[2] (S.F. V. 17, p. 16, l. 4--p. 161, l. 8; p. 162 l. 20--p. 163 l. 5)

[3] (S.F. V. 17 p. 153 l. 5-12; V. 17 p. 167 l. 19-20; V. 14 p. 116, l. 21)

Briner stock on January 5, 1964. At the time of issuance and at the time of John and Lorene's marriage[4] the stock was valued at $25.00 per share[5] John and Lorene purchased 100 shares on September 30, 1974 and another 100 shares on September 30, 1980.[6] On May 17, 1983, 2,000 Briner shares were reissued to John Nee when no other executive at Briner received a re-issuance of stock.[7] John and Lorene were both required to enter into stock repurchase buy-sell agreements with Briner wherein upon John's death or retirement, the 2,200 shares were resold

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[4] (S.F. V. 17 p. 172 l. 20-22)

[5] (S.F. V. 14 l. 13-16; V. 18 p. 22 l. 3-6)

[6] (S.F. V. 17, p. 173 l. 18-25)

[7] (S.F. V. 18 p. 38 l. 12-19)

to Briner.[8]

John retired from Briner on February 1, 1984. On April 10, 1984, Briner executed a promissory note to repurchase the 2,200 Briner shares for $467.51 per share pursuant to the buy-sell agreement for $771,391.50 principal and $144,236.30 interest for a total of $1,028,522.00.[9] A down payment of $257,135.00 was paid to John and Lorene at that time.[10]

The Briner note provided for five annual installments in the amount of $183,125.56 which included both principal and interest. The payments were scheduled April 10, 1985, April 10, 1986, April 10, 1987, April 10, 1988, and April

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[8] (S.F. 17, p. 184 l. 6-23; V. 17 p. 188 l. 1-16)

[9] (PX 8)

[10] (S.F. V. 17 p. 236 l. 6--p. 240 l. 9; V. 17 p. 7 l. 10-24; PX 139)

10, 1989. (PX 8).

The Briner stock repurchase buy-sell agreement/promissory note plan was a deferred compensation or retirement program.[11] The retirement scheme provided for limited key employees, such as John Nee, to leave earnings in the corporation which allowed the corporation to grow, then resell the stock back to Briner upon retirement. John Nee elected to retain monies in Briner over their 17 year marriage, which he could have taken as salary. John and Lorene Nee's election to retain John's earnings in Briner and take less salary during they 17 year marriage, allowed them to postpone the gratification of earnings as retirement at capital gains rates of 27 1/2 percent

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[11] (S.F. Robert Tollen, economist, V. 18 p. 108 l. 20--p. 109 l. 2; V. 18 p. 109 l. 3--p. 112. l. 17)

rather than at ordinary income rates of 50 percent, which allowed their "cows to come home" upon John's retirement and both enjoy a greater proportion of those monies because he and Lorene were taxed at a reduced rate.[12]

John as the chemist at Briner, formulated their paint products, and was world renowned in his abilities and expertise in chemical paint formulations.[13] Largely because of John's

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[12] (S.F. Paul Laudadio, V. 18 p. 30 l. 25--p. 31 l. 8; p. 53 l. 24--p. 54 l. 3; V. 23 p. 161 l. 21--p. 163 l. 3; Louise Thompson, V. 23 p. 101 l. 9--p. 102 l. 11; V. 18 p. 109 l. 3--p. 112 l. 17; V. 23 p. 145 l. 18--p. 146 l. 5; p. 148 l.16--p. 149 l. 22; V. 23 p. 150 l. 22--p. 153 l. 11; Robert Tollen, V. 18 p. 103 l. 24--p. 104 l. 17; p. 106 l. 25--p. 107 l. 18; p. 185 l. 23--p. 188 l. 12; V. 18 p. 104 l. 18--p. 106 l. 24); Scott Turner, accountant, V. 21 p. 73 l. 17--p. 76 l. 2)

[13] (S.F. Joseph Snedden, V. 17, p. 130 l. 4-19; David Nee, V. 20 p. 75 l. 5--24; V. 20 p. 93, l. 24--p. 94 l. 19)

ability and expertise, Briner became a very successful corporation. From 1975 through 1983, the company was able to retain almost $1,000,000.00 in cash reserves. The reason the company grew and had such cash reserves was because John Nee deferred his earnings and compensation while he was active in Briner until his retirement, when the stock was resold to Briner, he chose to defer his income rather than take a larger salary as did the other Briner key employee, officer, and principal, Paul Laudadio.[14] The increased value of the Briner stock directly resulted from John Nee retaining earnings in Briner.[15] During the marriage, Lorene worked at the Army

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[14] (S.F. V. 18 p. 85 l. 10--p. 87 l. 24; V. 18 p. 88 l. 7--p. 89 l.3)

[15] (S.F. Dr. Robert Tollen V. 18 p. 97, l. 10-15; p. 98 l. 5--p. 98 l. 10--p. 99 l. 7; PX 136)

Navy Depot as a bookkeeper.[16] Lorene's continuing to work during their marriage also allowed John the flexibility to defer his earnings to the growth of the corporation, rather than take monies he was entitled to receive as salary during their marriage.[17]

Lorene E. Nee came into her marriage to John Nee with substantial monies and property from her previous marriage to Mr. Erlandson.[18] She placed her separate funds in two accounts, earmarked "separate property." Petitioners traced by clear and convincing evidence a $25,000.00 certificate of deposit and $8,609.00 in checking account number

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[16] (S.F. Julie Verwers, V. 20 p. 13 l. 16--p. 14 l. 9)

[17] (S.F. Paul Erlandson, V. 16 p. 102 l. 6-18)

[18] (S.F. V. 14 p. 13 l. 17--p. 14 l. 1; p. 17 l. 15--p. 18 l. 5).

20989 at the Navy Army Federal Credit Union; and $38,388.00 Merrill, Lynch account number 532-45782 as Lorene E. Nee's separate funds. Mr. Erlandson died on November 2, 1962 and John and Lorene Nee were married on June 3, 1967. A portion of Lorene Nee's separate property was used to place the entire down payment on their home at 714 St. Pius. She place other funds into an account at the Army Navy Credit Union and at Merrill Lynch. Monies spent first were community, and Lorene Nee spent more funds from the account than what was initially deposited and earned on the accounts.[19] Lorene Nee

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[19] PX 1, PX 23, PX 142-162, PX 163; S.F. Paul Erlandson, V. 15 p. 19 l. 25--p. 23 l. 12; p. 26 l. 24--p. 29 l. 17; p. 35 l. 25--p. 41 l. 3; V. 14 p. 42 l. 9--p. 44 l. 14; V. 14 p. 42 l. 19-17; p. 41 l. 12-16; V. 15 p. 20 l. 25--p. 23 l. 12; p. 35 l. 7-11; p. 36 l. 3--p. 41 l. 3; Joseph Snedden, V. 17 p. 135 l. 4-21; p. 135 l. 9-20; V. 14 p. 13 l. 17--p. 14 l. 1).

had also inherited property from her grandmother.[20]

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[20] V. 14 p. 59 l. 20--p. 60 l. 1; PX 22).

Supreme Court, U.S.
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No.
90-1559

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PAUL J. ERLANDSON, INDIVIDUALLY AND AS INDEPENDENT EXECUTOR OF THE ESTATE OF LORENE E. NEE AND SANDRA VAN DER ES-ERLANDSON

Petitioners

versus

THE INTERNATIONAL BANK OF CORPUS CHRISTI, INDEPENDENT ADMINISTRATOR OF THE ESTATE OF JOHN W. NEE AND JOHN R. NEE, DAVID NEE, MICHAEL G. NEE AND LINDA NEE BECK

Respondents

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

BRIEF FOR RESPONDENTS

Charles R. Cunningham
Counsel of Record for Respondents
503 Wilson Tower
Corpus Christi, Texas 78476
(512) 884-9337

LIST OF ALL PARTIES

Petitioners:

1. Paul J. Erlandson, Independent Executor of the Estate of Lorene E. Nee, Deceased
2. Paul J. Erlandson, beneficiary of the Estate of Lorene E. Nee
3. Sandra Van der Es-Erlandson, beneficiary of the Estate of Lorene E. Nee

Respondents:

1. The International Bank of Corpus Christi, Independent Administrator of the Estate of John W. Nee
2. John R. Nee, beneficiary of the Estate of John W. Nee
3. David Nee, beneficiary of the Estate of John W. Nee
4. Michael G. Nee, beneficiary of the Estate of John W. Nee
5. Linda Nee Beck, beneficiary of the Estate of John W. Nee

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No. 90-1559

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PAUL J. ERLANDSON, INDIVIDUALLY AND AS INDEPENDENT EXECUTOR OF THE ESTATE OF LORENE E. NEE AND SANDRA VAN DER ES-ERLANDSON

Petitioners

versus

THE INTERNATIONAL BANK OF CORPUS CHRISTI, INDEPENDENT ADMINISTRATOR OF THE ESTATE OF JOHN W. NEE AND JOHN R. NEE, DAVID NEE, MICHAEL G. NEE AND LINDA NEE BECK

Respondents

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

BRIEF FOR RESPONDENTS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Your Respondents, The International Bank of Corpus Christi, Independent Administrator of the Estate of John W. Nee, John R. Nee, David Nee, Michael G. Nee, and Linda Nee Beck, who are the parties against whom Petitioners sought relief in the Texas appellate courts respond as follows to the issues in Paul J. Erlandson's petition for writ of certiorari:

I. SUMMARY OF ARGUMENT

The decision below rendered by the Thirteenth Court of Appeals of the State of Texas with the Petitioners' Application for Writ of Error from that Court being denied by the Texas Supreme Court was clearly in accordance with the bodies of laws of the State of Texas appertaining to Texas property laws and probate laws, including the Constitution of the State of Texas, the Texas Statutes and the Common law of the State of Texas. There is no question of any violations of any of the constitutional provisions of the Constitution of the United States or of any Federal laws that justifies the grant of a writ of certiorari here.

II. PERCEIVED MISSTATEMENTS OF FACT AND LAW CONTAINED IN THE PETITIONERS' CONCISE STATEMENT OF THE CASE

1. Misstatement of Facts

In accordance with the admonitions contained in the U.S. Supreme Court Rule

15, Respondents first address some of the more obvious misstatements and misleading implications contained in that part of the Petitioners' brief denominated as "Concise Statement of the Case" (see Petitioner's brief, pp. 29-33).

a. Contrary to the Petitioners' statement on page 29 that John W. Nee "held" 2,000 shares of Briner stock before marriage, the undisputed evidence was that John W. Nee had acquired (not "held") 2,000 shares of Briner stock on January 5, 1964, three years and five months prior to his marriage to Lorene E. Nee.

b. Contrary to the Petitioners' misstatement on page 30 that "the increase in the value of the stock was attributed to John Nee retaining community earnings in Briner Paint and occurred wholly during the marriage of John and Lorene Nee", the findings by the jury, sustained by the Corpus Christi Court of Appeals and the

Texas Supreme Court was that reasonable compensation for John W. Nee from January 3, 1967 to May 31, 1984 was $1,269,890.00 and that his compensation for the same years was $1,269,890.00.

c. Contrary to the Petitioners' misleading implications contained in their statements on page 30 that Petitioners initiated litigation in this cause when Petitioners (Erlandsons) "brought suit under the Texas Declaratory Judgment Act against John's Estate and his children . . .", the uncontroverted facts are as set out in the opinion of the Corpus Christi Court of Appeals, that the Nees first brought a partition suit against the Lorene E. Nee Estate and that the Petitioners' ". . . declaratory judgment action was improper from its inception . . ." (See Corpus Christi Court of Appeals opinion at pp. 68-69 of Petitioners' appendix).

d. Contrary to the Petitioners' erroneous general statement on page 31 of their brief that "the jury found that John W. Nee had no separate interest in the monies" paid under the buy and sell agreement, the jury found that 2,000 shares of the John W. Nee stock (sold to Briner under the buy and sell agreement) were issued to John W. Nee prior to his marriage to Lorene E. Nee (see Court's Charge at page 153 of Petitioners' appendix). Additionally, the Court of Appeals found as a matter of law that 90.91% of the money paid to John W. Nee by Briner for the purchase of the 2,200 shares of stock vested in John W. Nee as his separate assets (See Corpus Christi Court of Appeals opinion, page 26, Petitioners' appendix).

e. Contrary to the Petitioners' statement contained on page 32 of their brief that the Court of Appeals denied the Lorene E. Nee Estate "its separate proper-

ty rights of $71,977.00", the Court of Appeals ruled that as a matter of law that the Lorene E. Nee Estate totally failed to overcome the legal presumption (Texas law) that all property possessed by either husband or wife upon the termination of marriage is presumed to be community property. (See Corpus Christi Court of Appeals opinion, page 52 of Petitioners' appendix)

f. Contrary to the Petitioners' misstatement of fact on page 32 of their brief that the Thirteenth Court of Appeals of Texas denied the Lorene E. Nee Estate her community property interest in the $1,028,522.00 proceeds received for the sale of the 2,200 shares of Briner stock, 2,000 shares of which were the separate property of John W. Nee and 200 of which were the community property of John W. Nee and Lorene E. Nee, the Court of Appeals did in fact award the Lorene E. Nee Estate

its full 4.545% ownership interest in the total proceeds of the sale of the 2,200 shares. John Nee's separate ownership interest in the 2,200 shares was 95.455% (2,000 separately owned shares (90.91%) plus 4.545%, being one-half of 9.09%, the interest attributable to the 200 former community Briner shares). (See Corpus Christi Court of Appeals opinion at page 26 of Petitioners' appendix)

2. Misstatements of Texas Law

a. Contrary to the Petitioners misstatement of Texas law on page 31 of their brief that the jury finding of "deferred compensation"[1] transformed the proceeds of the sale of John W. Nee's separate 2,000 shares of stock owned by him prior to his marriage to Lorene E. Nee into the community assets of John W. Nee and

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1. Disregarded as a meaningless finding by the Court of Appeals.

Lorene E. Nee, Texas law to the contrary as set out in Art. 16, Sec. 15 of the Texas Constitution, dictates that "all property, both real and personal of a spouse owned or claimed before marriage and that acquired afterward by gift, devise, or descent shall be the separate property of that spouse" as does the TEX. FAM.CODE ANN., §5.01.

b. Contrary to the Petitioners' misstatement of law made by the Petitioners on page 31 of their brief that the $1,028,522.00 monies paid pursuant to the buy and sell agreement became community assets on a "deferred compensation" theory, The Court of Appeals correctly ruled as a matter of law that 90.91%[1] of

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1. Attributable to the 2,000 shares owned as separate property by John W. Nee, i.e. 2,000 ÷ 2,200 = 90.91%; 200 shares or 9.09% being community, i.e. 200 ÷ 2,200 = 9.09%; 4.545% Lorene E. Nee's one-half share and 4.545% John W. Nee's one-half share, John Nee's total shares being 95.455%.

the proceeds of the sale of the 2,200 shares of Briner stock were the separate assets of John W. Nee. (See Corpus Christi Court of Appeals opinion at page 26 of Petitioners' appendix)

c. Contrary to the Petitioners' implications set out in page 33 of their brief that the Court of Appeals and the Supreme Court of Texas failed to adhere to Texas appellate law in refusing to grant a rehearing en banc of the Court of Appeals decision, the Court of Appeals at all times relevant to the ruling it handed down denying the Petitioners motion for rehearing en banc was composed of four qualified justices, two more than statutorily required to render that Court's order denying the Petitioners' motion for rehearing.

III. RESPONDENTS' CONCISE STATEMENT OF THE CASE

Because of the numerous misstatements

of fact and law contained in the Petitioners' version of a "Concise Statement of the Case" as set out above, the Respondents respectfully submit their concise statement of the case which is as follows:

John W. Nee went to work for Briner Paint Mfg. Co. in October, 1949, as a chemist. He retired on February 29, 1984. Briner began doing business as a corporation on October 10, 1949.

On January 5, 1964, John W. Nee, a single man, acquired 2,000 shares of Briner Paint Mfg. Co. stock.

Both John Nee and Lorene Nee had prior marriages. Lorene Nee had two children born of her prior marriage, Paul James Erlandson and Sandra van der Es-Erlandson.

John W. Nee had four children by prior marriages, John R. Nee, David Nee,

Michael G. Nee, and Linda Nee Beck.

Subsequent to his marriage to Lorene on June 3, 1967, John purchased one hundred shares of Briner stock on September 30, 1984 and an additional one hundred shares on September 30, 1980.

On April 10, 1984, 51 days before the death of Lorene on May 31, 1984, Briner purchased all of John W. Nee's 2,200 shares, including both his 2,000 separate shares and the 200 community shares. The purchase price for the 2,200 shares was $1,028,522.00, with a downpayment of $257,130.50 and a note in the principal amount of $771,391.50 with 6% interest payable in five equal annual installments in the amount of $183,125.56, the first being due on April 10, 1985, and the last being due April 10, 1989. The Nees on April 10, 1984, deposited the $257,130.50 downpayment in their MBank joint account

number 651-959-8.

John W. Nee's 2,200 separate shares were 90.91% of the total 2,200 shares John Nee sold to Briner, (2,000 ÷ 2,200 = 90.91%), and the 200 community shares were 9.09% of the 2,200 shares (200 ÷ 2,200 = 9.09%). Thus, $233,757.34 of the downpayment was the separate assets of John W. Nee and $23,373.16 was the community assets of John and Lorene Nee.

On April 10, 1984, before the $257,130.50 Briner downpayment was deposited, the balance in the joint account was $125,258.89. After the deposit the balance increased to $382,389.39.

Fifty-one days after John Nee sold the 2,200 shares to Briner, Lorene died on May 31, 1984. As of May 31, 1984, the 6% interest then accumulated on the principal of the $771,391.50 note was $6,467.01 ($46,283.49, one year's interest on prin-

cipal amount of $771,391.50 divided by 51/365). After May 31, 1984, John Nee's ownership of the principal and interest in the note was 95.455% (90.91% separate interest in principal plus 4.545%, one-half of the 9.09% community interest).

The first of five annual installments in the amount of $183,125.56 was due on April 10, 1985. The remaining four installments were due on April 10, 1986, April 10, 1987, April 10, 1988, and April 10, 1989.

Lorene E. Nee devised all of her estate to her two children except for two pieces of jewelry given to Linda Nee.

After John W. Nee died on October 20, 1986, his Will was admitted to probate in County Court at Law Number Three, Nueces County, Texas, Cause No. 28329-3. The International Bank of Corpus Christi was subsequently appointed Administrator With

the Powers of an Independent Executor and replaced John Nee as a party.

This partition suit was filed by John W. Nee on December 19, 1984, the surviving spouse of Lorene E. Nee, against Paul J. Erlandson, the Independent Executor of the Estate of Lorene E. Nee, Deceased, under the authority of TEX.PROB.CODE ANN., Secs. 385, 386, and 387, to partition his separate property and his one-half interest community property from the Estate of Lorene E. Nee; the suit was filed in the County Court at Law No. One, Nueces County, Texas, where the Lorene E. Nee probate proceeding was then pending as cause no. 39042-1.

The case went to trial on October 21, 1987. The jury's verdict was returned on December 8, 1987.

The case was appealed by the Estate of John W. Nee to the Thirteenth Court of Appeals. A Judgment and opinion generally

favorable to the Respondents was handed down on February 1, 1990. (The opinion is set forth in full in the appendix to the Petitioners' brief, pages 5 - 96).

The Supreme Court of the State of Texas denied Petitioners' application for writ of error on November 14, 1990, and their motion for rehearing on January 9, 1991. (See appendix to Petitioners' brief at pp. 141-144).

IV. THE CONTENTS OF THE PETITIONERS BRIEF RAISE NO FEDERAL QUESTIONS

U.S. Supreme Court Rule 14(h)
(Response to Petitioners' brief "Federal Questions Raised" page 34)

The Petitioners never, either at the trial or appellate level in this proceeding, specified any federal questions sought to be reviewed as required by U.S. Supreme Court Rule 14(h). Additionally, neither are any federal questions contained in the records of this proceeding. (See Petitioners' brief, page 34).

The Petitioners' statements of the case concerned with the raising of Federal Questions are contained on pp. 34-36 of their brief. The questions therein set out by the Petitioners relate solely to the Texas Rules of Appellate Procedure and the Texas statutes creating the fourteen Courts of Appeal of the State of Texas. The response the Respondents made to the same allegations that the Petitioners raised in the State Appellate Courts is as follows:

"As the Honorable Supreme Court of Texas is aware, the Court of Appeals for the Thirteenth Judicial District of Texas consists of a chief justice and five associate justices. TEX.GOV'T.CODE ANN., Sec. 22.2216(m)

As the record reflects, the case at Bar was first submitted to a panel consisting of three judges, composed of Justice Utter, presiding (author of its

opinion), Justice Kennedy, and Justice Dorsey. After the oral argument was concluded, Justice Dorsey recused himself from the case leaving two justices (a majority) to decide the case, which they did by Judgment and written opinion dated February 1, 1990 (See Rule 79 TEX.R.APP. P.).

Judge Utter died before ruling on the Erlandsons' motion for rehearing, leaving one Justice (Justice Kennedy) on that panel. However, contrary to the Erlandsons' statement, there remained four qualified justices on the Court to rule on Erlandsons' motion for rehearing, Chief Justice Nye and three associate justices, Justices Kennedy, Seerden, and Benavides. Those four justices (a majority of the six authorized justices) validly overruled the Erlandsons' motion for rehearing as well as the Nees' subsequently filed limited motion for rehearing as authorized by Rule

100(c) TEX.R.APP.P See Rule 90, TEX.R. APP.P. as to the Court's right to publish or not to publish.

The MAPCO and Hayden cases cited by the Erlandsons in support of their untenable position that the ruling by the four justices refusing their application for rehearing was contrary to statutory law and that Rule 79 TEX.R.APP.P. is unconstitutional are not remotely in point. See Hayden vs. Liberty Mutual Fire Insurance Company, 786 S.W.2d 260 (Tex. Sup.) (Feb. 28, 1990) and MAPCO vs. Forrest, 795 S.W.2d 700 (Tex. Sup.) (March 7, 1990). Both the Hayden and MAPCO cases were before the Ninth Court of Appeals of Texas, which is statutorily composed of only three Judges. TEX.GOV'T.CODE ANN., §22.216(i). In the Ninth Court's cases Judge Dies, after hearing oral argument, resigned before the cases were decided, leaving the decisions of both of the cases

to two judges, one of whom dissented, leaving only one Justice who then solely decided the cases. Obviously one judge is not a majority of three; hence the impossibility of the Ninth Court's complying with the dictates of Rule 79(b), TEX.R. APP.P. requiring a decision by two judges assigned to a panel or by a majority of the Court sitting en banc.

In the case at bar, the opinion of the Texas Thirteenth Court of Appeals (Corpus Christi) was approved by a majority of the three Justice panel assigned to hear the case. It was only after the judgment and the opinion in this cause were approved by the two Justices on the panel (Utter and Kennedy), that the three Judge panel was reduced to only one Justice (Kennedy) upon the death of Judge Utter. There then remained four sitting Justices on the Thirteenth Court of Appeals who remained available after the

death of Justice Utter and the recusal of Justice Dorsey (see Sec. 2.223 TEX. GOV'T.CODE ANN., Rule 79(b) TEX.R.APP.P.) to act on both the Erlandsons' motion for rehearing, as well as the Nees' subsequently filed motion for partial rehearing, such justices being Chief Justice Nye and associate Justices Kennedy, Seerden and Benavides.

The Erlandsons cite no authority to buttress their constitutional arguments. They cite Art. I Sec. 15 and Sec. 13 of the TEX.CONST., neither of which is authority for their contentions. The Erlandsons had a nine week jury trial in open Court. None of their rights have been abrogated in this Appellate process."

V. ARGUMENT

It is respectfully submitted that the Petitioners have wholly failed to sustain their burden of establishing under U.S.

Supreme Court Rule 10 that there are any special and important reasons why a writ of certiorari should be granted. The Texas State Court's decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor did the opinion of the Thirteenth Court of Appeals of the State of Texas (writ denied by the Supreme Court of the State of Texas), the Court of last resort in the State of Texas, decide a federal question in a way that conflicts with the decision of another State Court of last resort or of a United States Court of Appeals; nor has the State Court of last resort of the State of Texas decided a federal question in a way that conflicts with any applicable decision of the Supreme Court of the United States of America.

The Thirteenth Court of Appeals of the State of Texas and the Texas Supreme

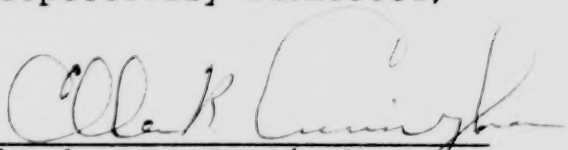
Court correctly decided this State cause under Texas law which in no way conflicts with any provisions of the Constitution of the United States or with any Federal statutes or Federal laws.

VI. CONCLUSION

The Petitioners' petition for writ of certiorari should be denied.

IT IS SO MOVED.

Respectfully submitted,



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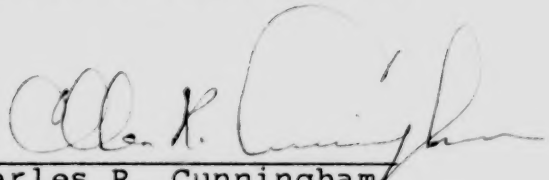
CERTIFICATE OF SERVICE

I, Charles R. Cunningham, certify that on this the 3 day of May, 1991, a true and correct copy of the foregoing was mailed to Counsel for Petitioners, William H. Berry, Jr. and Gail D.C. Dorn at Post Office Box 23063, Corpus Christi, Texas 78403.



Charles R. Cunningham